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Briefs of Maury for P. & D.

Filed Oct. 10, 1896.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 125.

A. A. McCULLOUGH,

vs.

THE COMMONWEALTH OF VIRGINIA.

Reply Brief of

RICHARD L. MAURY,

For the Plaintiff.

IN THE

Supreme Court of the United States.

A. A. McCULLOUGH,

v.

THE COMMONWEALTH OF VIRGINIA.

REPLY BRIEF OF RICHARD L. MAURY, FOR THE PLAINTIFF.

UPON THE JURISDICTION.

It abundantly appears, as well from the record as the statements and briefs of counsel, already filed, that this is a case depending upon legal principles which, in this tribunal, have been already so often adjudicated and affirmed, that in the later decisions thereupon it has been expressly determined that they are no longer open to controversy or denial. (*McGahey* v. *Virginia*, 135 U. S. 662.)

It is, in short, a case instituted by the petitioner after your decisions just referred to (and therefore with full faith and reliance upon their sufficiency to support the claim asserted), to procure the reception of his coupons for his taxes as provided by the act under which he was proceeding, wherein, by the decision of the highest court of Virginia dismissing the petition, the appellant is denied, not only the remedy which the statute affords, and which the Supreme Court of the United States has declared to be the absolute right of every holder of these coupons, protected by the Constitution and laws of the United States, of which they cannot lawfully be deprived (*Antoni* v. *Greenhow*, 107 U. S. 771); but his coupon contract, which

the same supreme tribunal has adjudged to be valid, legal, inviolable, unalterable, protected and shielded by the Constitution and laws of the United States (*Poindexter* v. *Greenhow*, 114 U. S. 279; *McGahey* v. *Virginia*, 135 U. S. 668), is now declared to be utterly null and void. Thus, by indirection, but conclusively, validity is given to an act of the Virginia Legislature, passed after the issuance of the coupons, which forbids that they be received for taxes, an act which both this court and the said Virginia court have time and again and invariably held to be obnoxious to the Constitutions, both State and Federal. The act thus validated is the act of 1872–'3, frequently referred to in the many Virginia coupon decisions here, and has been reaffirmed and adopted as section 399 of the Virginia Code of 1887, whose words are as follows: "It shall not be lawful for any officer charged with the collection of taxes . . . . . to receive in payment thereof anything else than gold or silver coin, or United States treasury notes, or national bank-notes." And, indeed, validity is thus given to the many other acts of Virginia forbidding the use of these coupons, all of which your honors have decided to be invalid because they impaired the obligation of this contract. They are fully described in the decisions to which we will presently refer.

It is not, therefore, such a case as the distinguished Attorney-General supposes and cites authority for, because the question for your determination now is not whether you will follow the first or the last State decision, but whether you will follow your own, or that of the Virginia Court of Appeals.

It is a case of a suitor pursuing a remedy, as a means of procuring the reception of his coupon for his tax, which the Supreme Court of the United States had previously decided is his, and cannot, without violation of the United States Constitution, be denied him—a remedy which the said court had decided was a right inherent to every coupon. (*Antoni* v. *Greenhow*, 107 U. S. 769.) He is, therefore, asserting a

Federal right, and it is denied him by dismissing his petition.

It is a case of a suitor asserting a contract right protected by the Constitution and laws of the United States; and a decision that his alleged contract is not a contract at all, and therefore not protected by the Constitution and laws of the United States, for although in his petition below he did not in terms claim the above Federal rights, yet by all the rules of pleading and procedure he has claimed them, because one who sues claims and asserts every right and every law and every decision which supports his claim, for these are the law of the case and are all relied upon and involved without being specially plead; and the opinion of the court below and its decree thereon clearly show that the Federal right is denied him.

It is a decision to support which the Virginia court hath construed and interpreted a decision of the Supreme Court of the United States, hath declared it to be exactly what the Supreme Court itself declared it was not, and which, therefore, violates Section 1, Article IV., United States Constitution. And, failing to recognize and follow said decision as the supreme law of the land, being the decision of the Supreme Court of the land, it also violates Section 1, Article III., and for a like reason Section 2, Article VI.; for it is submitted that the Supreme Court being the ultimate tribunal to ascertain and declare what is the law of the United States, its declarations must, at least, be of equal force and effect to the Constitution and laws and treaties which it is empowered to interpret. Its decision, therefore, must be considered as included in, and as part of, that supreme law of the land which the judges in every State are directed to recognize and obey, and which these Virginia judges have attempted to evade and utterly disregard.

It is a decision the direct and necessary result of which is to validate a law of the State passed subsequent to the contract, which the Supreme Court and the State court both have held to be obnoxious to that clause of the Constitution

of the United States which forbids that contracts be impaired. (*Antoni* v. *Greenhow*, 107 U. S. 771.)

It is a decision which more than impairs the contract asserted, for it destroys it, and decides that the alleged contract is not a contract at all.

But for the special feature herein (which most assiduous search has failed to find in any of the cases where jurisdiction has been declined), that the alleged contract has already been decided in this court to be such, and within the protection of the United States, it might be logically answered that the decision complained of is but one of construction, not of validity, and only determined that the compact which the plaintiff denominated a contract was not such. But this may not be said within these walls, for here, at least, it cannot and will not be denied that the contract is a valid and binding one, and can no longer be assailed or its validity disputed. This court itself has so determined many times. (*McGahey* v. *Virginia*, 135 U. S. 668.)

It is a decision in violation of his right under his contract, because it denies to the petitioner the only remedy he hath to procure the reception of his coupons in payment of his taxes, the proceeding he adopted being the sole remedy afforded him by the State, whose statute, cited upon the first page of the petition for this writ of error, provides that when the coupons thus presented shall have been adjudicated genuine they shall be received for the taxes for which they were tendered. (§ 408; p. 2 of the Record.)

Thus there are many Federal questions involved, any one of which will suffice for your jurisdiction.

Perhaps, indeed, there are others besides those already indicated, for, as the contract sued on, and which this court has adjudicated to be valid, inviolable, and within the protection of the Constitution of the United States, has, by the decision complained of, been declared to be indivisible, void in part, and, therefore, void altogether, and as a part of this contract is a promise to pay money, that is to say, legal money as determined by the laws of the United States, the case

falls within the rule of *Woodruff* v. *Mississippi*, 162 U. S. 302, where it was held that a Federal question had been decided, and that a writ of error would lie.

It is, therefore, apparent that there are now involved, in the decision complained of, the identical questions which this court holds that it has finally disposed of. You have said in *McGahey* v. *Virginia*, 135 U. S. 668: "We have no hesitation in saying that the act of 1871 was a valid act, and that it did and does constitute a contract between the State and the holder of the bonds issued under it, and that the holders of the coupons of said bonds . . . are entitled, by a solemn engagement of the State, to use them in payment of State taxes, ... this question may be considered, therefore, as foreclosed and no longer open for consideration." Also that the act of 1872–'73 (p. 9, chap. 12, par. 1), Code of Virginia, edition 1887, § 399, which forbids the reception of coupons for taxes, is unconstitutional and void. (*Hartman* v. *Greenhow*, 102 U. S. 672; *Antoni* v. *Greenhow*, 107 U. S. 771.) And you have also determined that the remedy adopted below by the plaintiff, the culmination of which, the statute says, shall be the reception of the coupons tendered for taxes, for section 408, Virginia Code, (Record, p. 2), provides, "If it be finally decided in favor of the petitioner that the coupons tendered by him are genuine coupons, legally receivable for taxes, debts, and demands, then the judgment of the court shall be certified to the treasurer, who, upon receipt thereof, shall receive said coupons and shall refund the money," etc., is inherent to the coupon contract, and the absolute right of any tax-payer holding these coupons. (*Antoni* v. *Greenhow*, 107 U. S. 775.) And, furthermore, you have also decided that the effect of your decision in *Vashon* v. *Greenhow*, 135 U. S. 713 and 716, did not invalidate the entire coupon contract.

In contravention of every one of these decisions, the Court of Appeals of Virginia now determines the direct converse of each—*i. e.*, that the act of 1871 (and 1879) is unconstitutional, that the coupon contract is null and void, that the

act forbidding the receipt of coupons for taxes is valid, and that the plaintiff hath not the right to the remedy he used, for the court dismissed his petition, and that, too, without even returning to him either the coupons or the money which he had delivered to the collector, as he was required to do by the law (Record, p. 1, § 407, and p. 9), thus depriving him of his property without due process of law.

It will not be denied that the object and intent of the Constitution and laws of the United States and of the judiciary act was to confer jurisdiction upon Federal courts to afford protection to every right and privilege conferred upon a citizen by our Constitution and laws. Nor will it be denied that one of such rights is that the judgments and decisions of the Supreme Court shall be accepted, followed, and obeyed by all, and cannot be misinterpreted and perverted to his prejudice and injury. Nor can it be controverted that any one asserting any claim, right, or demand by legal proceedings, thereby in effect claims every right, title, privilege, immunity of, and authority under, all laws, both State and Federal, as well as of all decisions of the Supreme Court which support his claim; or that in Virginia the opinion of the Court of Appeals is made part of the record of the case. (Virginia Constitution, § 4, Art. VI.)

If these postulates be correct, then we maintain that our case falls clearly within the rule of jurisdiction stated by the Chief Justice in *Sayward* v. *Denny*, 158 U. S. 184: "The right on which the party relies must have been called to the attention of the court in some proper way, and the decision against the right claimed; or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved, so that the State court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State court can be held to have disposed of such Federal question by its decision."

If, by "reasonable intendment" this court will be satisfied,

for jurisdictional purposes, that a Federal question has been decided, how much more by the express language of the court below itself stating in terms its decision of a Federal question.

"If the facts and the decision are such as to show that a Federal right was adversely decided below, the jurisdiction of the Supreme Court of the United States is not defeated by showing that the record does not mention a Federal question, or state in terms that one was presented below. . . . . Whenever rights acknowledged and protected by the Federal Constitution are denied under the shield of State legislation, this court is authorized to interfere. . . . . The true test is, not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right." (*Murray* v. *Charleston*, 6 Otto, 432.)

"In order to sustain the jurisdiction of this court upon the ground that a Federal question is presented, it should appear . . . . that such question was apparent upon the record, and that a decision was made thereon." (*New Orleans* v. *Water-Works*, 142 U. S. 79.

We submit that it matters not how or when the question was presented, if in very fact it was presented, and if in very fact it was decided; it is immaterial how the wrong has been done, if it has been done, and it comes to the same thing here, if the right has been denied, whether the court below has misconstrued the act of 1871 or the decision of the United States Supreme Court.

In *Furman* v. *Nichol*, 8 Wall. 44, the rule is thus stated: "If the record shows . . . . that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of the court attaches. It is sufficient to confer jurisdiction that the question in the case was decided adversely to the plaintiffs, and that the court was induced by it to make the judgment it did."

In *Davis* v. *Packard*, 6 Peters, 49, the court said: "It has also been settled, that in order to give the court jurisdiction under the twenty fifth section of the judiciary act, it is not necessary that the record should state in terms that an act of Congress was, in point of fact, drawn in question. It is sufficient if it appears from the record that an act of Congress was applicable to the case, and was misconstrued."

In *Satterlee* v. *Matthewson*, 2 Peters, 410, the court said: "One of these principles is, that if it sufficiently appear from the record itself that the repugnancy of a statute of a State to the Constitution of the United States be drawn in question, or that that question was applicable to the case, this court has jurisdiction of the cause, ... although the record should not in terms state a misconstruction of the Constitution of the United States, or that the repugnancy of the statute . . . . to any part of the Constitution of the United States was drawn into question."

Mr. Phillips, in his most excellent work on the "United States Supreme Court Practice," page 179, fifth edition, thus summarizes the law: "It is now established that the jurisdiction cannot be avoided by the mere absence of express reference to some provision of the Constitution. Wherever rights protected by it are denied or invaded under the shield of State legislation, this court will interfere." [We respectfully submit that the distinguished writer was too cautious here, and that the limitation he speaks of does not exist, for Federal courts must have jurisdiction to protect Federal rights, from whatever source they spring, no matter how invaded.] "The form in which the Federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided."

"There is nothing in the act of 1867 (Rev. Stat. § 709) in reference to the mode in which it shall appear."

"Undue importance is often attributed to the inquiry whether the pleadings in the State court expressly assert a right under the Federal Constitution. The true test is, not whether the record exhibits an express statement that a

Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. It has always been held that the revisory jurisdiction exists over the judgments of the State courts when the determination of the court could not have been made without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right; and very little importance has been attached to the inquiry whether the Federal question was formally raised."

It would thus seem that it is not necessary to claim in express terms the Federal right relied on, if, in fact, it has been denied.

Let us examine, then, whether any Federal right *has* been denied McCullough.

The case of *Havemeyer* v. *Iowa*, 3 Wall. 294, seems surely to support our position that the destruction of a contract, hitherto adjudged valid by a decree of court, is an impairment, and therefore within the meaning of the Constitution of the United States, and the judiciary act.

It was a suit involving the validity of issue of certain county bonds, which, until then, had been invariably recognized as valid, but which had recently been decided to be invalid by reason of a new interpretation given to an old law, in existence before the bonds were issued. The Supreme Court held that such judicial interpretation would be an impairment of the contract, saying that if the contract, when made, was valid by the Constitution and laws of the State as then expounded by the highest authority whose duty it was to administer them, no subsequent action by the Legislature or the judiciary can impair its obligation, which rule, the court says, was established in *Gelpcke* v. *Dubuque*, 1 Wallace, 175, upon careful consideration, and that it rests upon a solid foundation, and will not be departed from. This rule there laid down is: "If the contract, when made, was valid by the laws of the State as then expounded and administered in its courts of justice, its validity and obliga-

tion cannot be impaired by any subsequent legislation, or decision of its courts. The same principle applies, where there is a change of judicial decision, as to the constitutional power of the Legislature to enact the law." Said the court: "To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principle of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." May we not add, as did Mr. Justice Swayne, "The rule embraces the case"?

We think that the language of the court in *Delmas* v. *The Merchants Insurance Company*, 14 Wall. 661, applies with great force, especially when it is remembered that it cannot now be denied by any one within *this* court that in the case at bar "there is a contract to be impaired." If, then, the court jealously takes jurisdiction upon the mere suggestion that there is a "contract to be impaired," how much more readily will it do so when it has itself already decided that there is a "contract to be impaired, and that it cannot be impaired"! It is this special feature in our case that differentiates it from the many decisions which may be cited wherein the preliminary question was, "contract, or no contract?" and the State court held that there was none; for by the Supreme Court, the supreme lawgiver of the land, acting under authority conferred by the Constitution and the laws of the United States, it has been determined that ours is a contract, valid and binding, which no authority of the State can modify or change. And it is the fact that there are such decisions, which brings every case instituted upon this contract after these decisions were made, within the rules of jurisdiction that the Federal right should be claimed, without making special mention of them.

The following is the language referred to: "Besides, this court has always jealously asserted the right, when the question before it was the impairment of a contract by State legislation, to ascertain for itself if there was a contract to be impaired. If it were not so, the constitutional provision

could always be evaded by the State courts by giving such a construction to the contract, or such decision concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional legislation."

It appears, therefore, that, while a record which shows suit upon a contract (being that which the Constitution says shall not be impaired by the State), and a decision by the State court that there was no contract, might not present a Federal question, it would be otherwise if the Supreme Court had already determined that there was a contract, and that it was protected by the United States Constitution.

In the first case, jurisdiction might fail because the State judgment was that there was no "contract, and therefore nothing to impair." But this is not always so. In the latter, jurisdiction would attach because, as the Supreme Court has established the contract which the State court afterwards holds to be non-existent, there must, of necessity, be an impairment, and, therefore, of necessity, jurisdiction to determine whether the contract were such an one as the Constitution referred to, and whether the impairment such as it forbids.

In such a case, therefore, it is plain that some "right or privilege, on which the recovery depends, will be defeated by one construction of the Constitution or laws of the United States, or sustained by another, and, therefore, the case will be one arising under the Constitution and laws of the United States." (*Pacific R. R. Co.* v. *California*, 118 U. S. 109.)

In like manner it hath been decided, in *Jefferson Bank* v. *Skelly*, 1 Black. 436, that this court hath appellate power to reverse decisions of the highest State courts whenever the latter shall adjudge that not to be a contract which is alleged in legal proceedings to be one within the meaning of that clause of the Federal Constitution which forbids impairment.

Mention has already been made that the decision complained of necessarily gives effect to many laws which impair the obligation of the contract. The various decisions in

the Virginia coupon cases give a full history and a detailed account of their character and application. For the sake of brevity we will base our argument upon a single one alone, which, like all the others, is validated by the decision complained of, and which thus brings the case within the constitutional inhibition, although the law actually interpreted by the decision complained of was anterior to the making of the contract relied on. The law referred to as being thus validated is the act of March 7, 1872, embodied in the Code of Virginia, 1887, Section 399.

It forbids the collectors to receive aught in payment of taxes save money. Hitherto it has been held uniformly, both by State and Federal courts, to be unconstitutional, because it impaired the obligation of the coupon contract. (*Antoni* v. *Greenhow*, 107 U. S. 769, where the court also said, that "any act of the State which forbids the receipt of these coupons for taxes is a violation of the contract and void as against coupon holders.") And in another connection, and considering the whole body of the many coupon laws in Virginia so fully described by the court in *McGahey* v. *Virginia*, 135 U. S. 662, the Supreme Court said (*Poindexter* v. *Greenhow*, 114 U. S. 304, 306): "The Acts of Assembly in question must be taken together, as one is but an amendment of the other. The scheme of the whole is indivisible. It cannot be separated into parts; it must stand or fall together. . . . The whole legislation, in all its parts as to creditors affected by it and not consenting to it, must be pronounced null and void. Such is the sentence of the Constitution itself, the fundamental and supreme law for Virginia, as for all the States, and for all the people, both of the States separately and of the United States, and which speaks with sovereign and commanding voice, expecting and receiving ready and cheerful obedience, not so much for the display of its power as on account of the majesty of its authority and the justice of its mandates." And in *McGahey* v. *Virginia* the court reiterated this, saying in effect that all the State laws which were passed for the pur-

pose of restraining the use of coupons for taxes were unconstitutional and invalid so far as they had such effect. The State court now declares that there is no coupon contract, and this in effect validates this law. But thereby the Federal question cannot be avoided, or a Federal right be thus deprived of the protection of the United States Court. This feature also differentiates our case from many that may be cited, where the courts have held that the judicial construction of a law, passed before the contract was made, cannot be held to impair what was not in existence, and therefore there is no Federal question involved in such decision, and brings our case within the rule, necessary to prevent just such evasions, that if the decision give validity to a subsequent law which impairs the obligation of the contract, jurisdiction will attach.

Therefore, "if by necessary operation the decision complained of gives effect to some law which impairs the obligation of the particular contract in question," a Federal question will be involved. (*Lehigh Water Co.* v. *Easton*, 121 U. S. 388.)

Our position in this respect is also supported by the decision in *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, the reasoning of which is most applicable to the case at bar. Said the court: "The Supreme Court of Illinois did not in terms pass upon the claim . . . . that the statutes in question were in derogation of rights and privileges secured to appellant under the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim, for if the statutes under authority of which the auditor proceeded are repugnant to the national Constitution, the judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States has been withheld or denied by the judgment below, and our jurisdiction is not defeated, because it may appear, upon examination of this Federal question, that the statutes are not so repugnant. Such an examination itself involves

the exercise of jurisdiction, and the motion to dismiss is denied."

Cases have occurred where, when legislative repeals or attacks upon contracts have been found to be such as the Supreme Court would declare void, State courts have attempted to avoid its jurisdiction, and at the same time destroy the contract by a forced construction of the laws in existence when it was made, and thus frustrate an appeal. But thus to accomplish by indirection what cannot be directly done is forbidden, and in such cases it is found that the Supreme Court has often taken jurisdiction.

In order that the statute of 1872, section 399 of the Code of 1887, should impair the contract obligation of the coupon, it is not necessary that that statute should itself be made *the reason* for declaring the contract invalid, or for restricting its full and proper obligation. Even if, as in the case at bar, the highest court of Virginia declares the contract invalid on grounds independent of the later act of 1872 (Code of 1887, § 399), still, if the declared invalidity of the contract, though placed upon such independent or general grounds, necessarily imparts to the subsequent statute an effect which it could not have but for the contract's invalidity, the contract is impaired by the later act. The essential thing is only that the subsequent act derives an effect which it cannot properly have if the contract is valid. An inconsistency between the subsequent statute, thus effectuated, and the rights growing out of the contract, correctly construed, makes a case of impairment of the obligation of the contract. It is the effect actually given to a statute subsequent to a contract, and claimed to impair it, which determines whether, if the contract exists, the statute does in fact impair it. The statute, as impliedly construed by the State court, and with the operation there accorded it, is what this court looks at to decide whether a contract has had its obligation impaired.

In the case at bar it is manifest that the tax-collector refused to receive McCullough's coupons outright in payment

of his taxes because he was forbidden to do so by section 399 of the Virginia Code. It was in obedience to this law that he acted as he did, and accepted the coupons, conditionally, until "verified." This law, therefore, though not specially plead, becomes a part of this case; it was, in fact, the very reason why there was a case at all, for without it the coupons would have been at once received in payment of the tax; and, as the effect of the decision complained of is to validate it entirely, the Federal question is apparent.

University v. *People*, 99 U. S. 309, sustains this proposition. The Supreme Court of the State of Illinois gave effect to an act of the Legislature passed after the act incorporating the university, and creating, as the institution insisted, an irrepealable contract, on the ground that the same was repugnant to the prior State Constitution. Jurisdiction of a writ of error by this court was strenuously resisted by the Attorney-General of Illinois, because the record did not disclose that the State court's decision was based upon any State law passed subsequently to the making of the supposed contract, or that any such claim was made in that court, but that the State court's judgment was simply that there was no contract, and was, hence, not reviewable here.

Mr. Justice Miller said, however, for this court, that the writ of error properly lay, because the State court was giving *effect* to the subsequent statute, although upon independent grounds, which was charged to impair the contract. Your honors will observe that neither in the record of this case, nor in the assignment of errors, is it charged that the contract is impaired by legislative act, and this, as stated, was one of the grounds of objection to jurisdiction.

Now, apply these rules to the case at bar. The Virginia court decided that the funding bill of 1871 did not and could not make an abiding contract. But it did not decide, and it could not, that the said acts did not give authority that the coupons should be received for taxes, until the Legislature choose to withdraw the privilege. The act of 1872, if valid, withdrew the privilege, and the Virginia court dismissed

McCullough's petition, which could not have been done for the reasons the Virginia court gives, except by treating the act of 1872 as valid, which is thus given effect by the decision complained of.

A motion to dismiss was made and overruled in *Wright* v. *Nagle*, 101 U. S. 793, for want of a Federal question, which deserves mention.

Appellant was the assignee of certain exclusive ferry rights, obtained in 1851 from an inferior court of Georgia. In 1872 the county officers authorized the appellee to exercise similar rights within the appellant's territory, who promptly applied for an injunction, setting forth his own contract, and charging that the same had been impaired in violation of the United States Constitution. The answer denied the validity of complainant's contract, and the court so deciding dismissed the bill.

Your honors will note that here was no legislative act, but a bare act of local inferior officers, whose validity was sustained by the State court and by inference only, for, as in McCullough's case, appellant's petition was dismissed for want of a contract right as claimed.

You stated (pp. 793–'4) that ordinarily a State court's construction of its statutes was conclusive on you, but declared in the same breath: "One exception, however, exists to this rule, and that is where the State court has been called upon to interpret the contracts of States, though they have been made in the forms of law, or by the instrumentality of a State's authorized functionaries, in conformity with State legislation."

"If the court," your honors say (p. 794), "erred in construing the statute, and in holding that there was no contract . . . . in this way, it seems to us, a Federal question is raised upon the record, which gives us jurisdiction."

If in Wright's case you reviewed a decision of the State court that he had no contract, upon a record charging an impairment thereof by subsequent non-legislative interference, how much more will you entertain McCullough's case,

where you yourselves have solemnly reiterated his possession of a right which he now complains to you is being not impaired only, but annihilated, by judicial interference.

You have repeatedly declared (*Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 697, and cases cited) it your duty, upon your own judgment, and independently of the adjudication of the State court, to decide whether there exists a contract within the protection of the United States. We submit that you will the more readily make such inquiry when requested by one, who, like McCullough, exhibits a right which yourselves have repeatedly affirmed is a contract, in the immunity whereof, you have said (*Poindexter* v. *Greenhow*, 114 U. S. 301), he is securely shielded by the Constitution.

Indeed, it would seem, for the purposes of jurisdiction, sufficient to *charge* an impairment of a contract's obligation by State law, and a justification by the State court of such impairment by the application of some general rule of law. It then becomes this court's duty to inquire whether such justification is well founded.

In *Given* v. *Wright*, 117 U. S. 656, your honors so expressed yourselves. Given resisted Wright's attempted collection of taxes on the ground that his property was exempt therefrom by virtue of a contract with New Jersey in 1758. The State court declared, upon a general principle of law, that the contract was long since abandoned, and the lands subject, therefore, to taxation.

These cases to which we have invited your attention indicate that it has ever been this court's inclination to examine for itself the question of contract or no contract when its assistance has been invoked, and it can see for itself that what is alleged to be a contract has, if such, been impaired, whether by express legislative interference, by *quasi* legislative interference, by judical decision in the remotest degree giving effect to subsequent legislation which would interfere, though the pleadings do not formally recite the chapter and line of the sacred instrument whose protection they in-

voke, nor specifically arraign the act of the State claimed to impair the right. Our contention is that McCullough tendered his coupons for verification only because it was recognized that the collector would refuse them otherwise in obedience to the act of 1872, section 399, Code of Virginia, 1887 edition; that he was, therefore, obeying said act, as well as the verification act; and that the Virginia court's decision, denying the validity of McCullough's contract and dismissing his petition, affirmed the validity of said act of 1872 in effect, and brings his case entirely, therefore, within the reasoning of those we have cited, in one and all of which this court overruled motions to dismiss for want of jurisdiction.

Your honors entertained a writ of error in *Hoadley* v. *San Francisco*, 124 U. S. 639, where only in the brief of counsel for Hoadley (page 645) was the Federal question presented as a specification of error, and you cite *The Bridge Proprietors* v. *The Hoboken Company*, 1 Wall. 116, 145, and say, "The existence of the contract or of the right is part of the Federal question itself."

Mr. Justice Gray has succinctly summarized the result of the authorities, applying to cases of contracts the settled rules that in order to give this court jurisdiction of a writ of error to a State court a Federal question must have been expressly or in effect decided by that court, in *New Orleans Water-Works* v. *Louisiana Sugar Co.*, 125 U. S. 38. He says, telling off the classes of cases *seriatim*, "So, when the State court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract *did* give the right, because, if it did, the subsequent law cannot be upheld."

Will your honors be referred to *Yazoo R. R. Co.* v. *Thomas*, 132 U. S. 174, strikingly resembling McCullough's case in the pleadings?

Appellant prayed for an injunction against Thomas and others, sheriff and tax collectors, to restrain the collection of certain taxes as illegal, asserting an exemption under a

prior State contract, and asserting that the same was protected under the contract clause of the United States Constitution. Defendants demurred to the bill, and the same was dismissed by the State court and affirmed by the Supreme Court on the ground that the company had not such contract as claimed. Your honors took jurisdiction, even though the ground of the State court's decision was other than that the contract set up was unconstitutional.

The case of the *Wilmington & Weldon R. R. Co.* v. *Alsbrook*, 146 U. S. 293, is also in point. The company enjoined the tax collector from collecting a tax upon part of its property under the general revenue law of the State, because its charter provided that all its property should be free of tax, for which it claimed Federal protection. Observe that there was no question as to the legality of the revenue law. The State court declared that the charter exemption did not cover the particular property alluded to, and upon writ of error this court took jurisdiction, because the necessary effect of the decision was to validate the revenue law, when the contrary decision would necessarily have invalidated it so far as applicable to the company's property.

Said the court: "The jurisdiction of this court is questioned, upon the ground that the decision of the Supreme Court of North Carolina conceded the validity of the contract of exemption contained in the act of 1834, but denied that particular property was embraced by its terms, and that, therefore, such decision did not involve Federal question.

"In arriving at its conclusion, however, the State court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and as the inquiry whether it did or did not was necessarily passed upon, we are of opinion that the writ of error was properly allowed." (*Wilmington & Weldon R. R. Co.* v. *Alsbrook*, 146 U. S. 293.)

Your decision in the case of *Given* v. *Wright*, 117 U. S.

655, is also pertinent and persuasive. It was instituted by land-owners within the "Indian Reservation" of New Jersey claiming exemption from taxation by the terms of the original grant. The defence was that this privilege had been, in effect, surrendered by acquiescence in taxation. Said the court: "The question then will be whether the long acquiescence of the land-owners under the imposition of taxes raises a presumption that the exemption which once existed has been surrendered. This question by itself would be a mere question of State municipal law, and would not involve any appeal to the Constitution or laws of the United States. But where it is charged that the obligation of a contract has been impaired by a State law, as in this case by the general tax law of New Jersey as administered by the State authorities, and the State courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection. (*Murdock* v. *Memphis*, 20 Wall. 590, 636: Prop. 6.)"

The case of *Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 486, is analogous to our own, and the principle for which we are contending seems clearly deducible from that decision. The case was thus: The railroad company was chartered by Tennessee, and by its charter exempt from taxes, which the State authorities attempted to collect, nevertheless, under a recent act taxing its property. The defence was that the tax law was an impairment of the obligation of the contract of the charter and, therefore, void. Had the State court directly adjudicated this question, there could have been no doubt of the right of the company to appeal to the United States Court. But the State court of Tennessee, like that of Virginia, sought to avoid the Federal question by so construing the State Constitution, in force before the charter was granted, as to determine that no contract had ever been made. Said Mr. Justice Jackson, in delivering the opinion of the court, p. 492:

"It is contended by counsel for defendants in error, that this court is without jurisdiction to review the judgment of the Supreme Court of Tennessee, because it was based or proceeded upon the ground that there was no contract in existence "between the company and the State to be impaired, and that the supposed contract was in violation of the State Constitution of 1834, and hence not within the power of the Legislature to make." . . . . "It is well settled that the decision of the State court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a State by its terms, or necessary operation, gives effect to some provision of the State law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the State law complained of impairs its obligation. A brief reference to some of the authorities is sufficient to show this." . . . "The grounds upon which the Supreme Court of the State held that the contract claimed by the company under its charter was invalid in no way affects the jurisdiction of this court. The legal existence of the contract itself, and its proper construction, is necessarily involved in the question of alleged impairment." We beg that your honors will refer to all of what was then said upon this subject. (Pp. 493–'95.)

If the mere allegation, whether true or the reverse, that the State law, validated by the decision complained of, impaired the contract relied on, suffices to give jurisdiction, surely the decision of this court already given, that such was the effect of the law thus validated, should not have less effect. In the many decisions of this court upon these Virginia coupons, you have always decided that the act of March 7, 1872, forbidding the receipt of coupons for taxes,

is unconstitutional and void, because impairing the obligation of the coupon contract. But by the present decision it is said that there is no such contract; if so, the law of 1872 is validated. As already said, this law has been incorporated into the Virginia Code of 1887, and is now section 399 thereof.

Now, in consideration of your decisions, and the former decisions of the Virginia Court of Appeals (*Antoni* v. *Wright*, 22 Grat. 833), that this law of 1872 does impair the obligation of the contract in question, we think that the necessity to jurisdiction of an allegation of that fact is obviated. If so, our case falls easily within the reason and rule of the *Bridge Proprietors* v. *The Hoboken Co.*, 1 Wall. 116; *i. e*, "Where a statute of a State creates a contract, and a subsequent statute is alleged to impair the obligation of that contract, and the highest court of the State *construes* the *first* statute in such a manner as that the *second* statute does not impair it, whereby the second statute remains valid under the Constitution of the United States, the validity of the second statute is 'drawn in question,' and the decision is in favor of its validity within the meaning of the twenty-fifth section of the judiciary act, and this court may examine and reverse said decree."

"A party relying on this court for re-examination and reversal, ... need not set forth specially the clause of the Constitution on which he relies. If the pleadings make a case which necessarily comes within the provisions of the Constitution it is enough."

In its chief feature this case is almost upon all fours with our own, for in both it was the earlier statute alone which was construed, and because upon that construction depended the constitutionality of the later one the Supreme Court took jurisdiction. It said, page 144: "But there is a misconception as to what was construed by the State court. It is very obvious that the statute of 1860 (the latter) was *not* construed. No doubt is entertained by this court, none

could have been by the State court, that the intent was to give the defendants the right to build the bridge. The act which really was the subject of construction was that of 1790, under which plaintiffs claim. For if that act and the proceedings under it amount to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void as impairing that contract. If, on the other hand, the first act and the agreement under it was not a contract, or, if being a contract, it did not prohibit the erection of such a structure as that authorized by the act of 1860, the latter act was valid because it did not impair the obligation of a contract. It was, then, the act of 1790 which required construction, and not that of 1860, in order to determine whether the latter was valid or invalid."

Now, as matter of fact, the record shows plainly that there was no express claim of any Federal right whatever by either of the parties. One claimed a contract by virtue of the act of 1790, the other a privilege or right under that of 1860, and the highest court of the State dismissed the plaintiff's petition; but this court decided notwithstanding that the constitutionality of the act of 1860 was necessarily "drawn in question" by the interpretation given by the decision to the act of 1790.

Perhaps we can better demonstrate how our case falls within these rules by considering it with special reference to the remedy which McCullough was following, and the denial thereof by the decision of the court complained of. It dismissed his petition.

Now, let it be observed that the origin of this whole contention was the effort of the tax collector to collect from McCullough, in money, a tax imposed by the general revenue laws of Virginia, notwithstanding his privilege, his immunity secured to him by the Constitution, the supreme law of Virginia, as of the whole land, to pay the same with his coupons. In this respect, therefore, the case is similar to *Wilmington & Weldon R. R. Co.* v. *Alsbrook*, and *Mobile*

& Ohio R. R. Co. v. *Tennessee*, *supra*, in both of which the suit arose because of the efforts of the State's officers to collect taxes under the general revenue laws of the State, as to which the companies claimed contract immunities. The result of the decision in the case at bar was that the tax has been collected in money, and McCullough is deprived of his claimed immunity, and of his right and privilege to pay in coupons.

He was pursuing a course with the object of having his coupons received for his taxes. It was a remedy given to all holders of these coupons in lieu of their earlier remedy by mandamus, and by this court, in *Antoni* v. *Greenhow*, 107 U. S 769, adjudged to be a constitutional and valid remedy, and as such an inherent right of every coupon, a part of its contract, which could not be denied the tax payer. The defence interposed was that the funding bill, under which the coupons were issued, was unconstitutional, and that, therefore, the coupons were not "legal coupons legally receivable for the taxes," etc., which defence the Court of Appeals of Virginia sustained by so interpreting the State Constitution as to make the said funding bill unconstitutional—a mode of reasoning somewhat involved, because the funding bill could not be held unconstitutional unless it made a contract, which, according to this decision, it could not do. The real *ratio decidendi* was, and must necessarily have been, that the funding bill which made the coupon did not make it an irrevocable contract, because it could not, and the plaintiff's petition was dismissed, because the act of March 7, 1872, Code of Virginia, § 399, forbade that coupons should be received for taxes thereafter, thus giving validity to this subsequent act, which, if the coupon be a contract, impairs or attempts to impair its obligation. If the funding bill made a contract, then the act of 1872 must be void as impairing that contract. If, on the other hand, as the Virginia court said, the funding bill did not make a contract, the later act was valid, because it did not impair a contract, and thus the constitutionality of the act of 1872

was necessarily drawn in question by the interpretation given by the decision to the funding bill or the Constitution of the State.

And observe that there is nothing whatever in the State Constitution which forbids that a coupon shall be receivable for taxes, nor was any such construction given it by the State court. The decision went no further in this respect than to hold that a contract to that effect could not be made, *i. e.*, an irrevocable agreement. But such an agreement, revocable at will, might be made, and according to the court's decision such an agreement, revocable at will, had been made, and McCullough's petition was dismissed because the law of 1872 was thus given effect as a revocation of the privilege. Such, we submit, is the true logic of the decision, and brings us strictly within the rules of *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116. "The grounds upon which the Supreme Court of the State held that the contract claimed . . . was invalid . . . in no way affects the jurisdiction of this court." (*Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 486.)

But there are other Federal questions involved also. One of them is presented by the failure of the Virginia court to give full faith and credit to the repeated former decisions of this court upon the coupon contract. Such a question, you have said, is one arising under the Constitution and laws of the United States, and falls within the jurisdiction of this court. By your repeated decisions in cases of coupon contracts before you, wherein Virginia or her officers were always parties, McCullough can now, and by his proceedings he does, claim a privilege or immunity under the Constitution or laws of the United States; and that privilege or immunity is certainly denied him when the State court utterly refused to give them *any effect*. Please observe that, as Mr. Justice Matthews, in *Crescent Live Stock Company* v. *Butchers' Union*, 120 U. S. 147, said: "It is within the jurisdiction of this court to determine . . . whether such due effect has been given by the Supreme Court" of the State to the

decisions of the Federal court drawn in question, meaning that you *readily inquire* whether the proper effect has been accorded your prior decrees; and the right to inquire imports jurisdiction.

The spirit of the rule would, we apprehend, lead the court, though no specific claim of privilege or immunity under your prior decisions be set up, when you can perceive from the scope of petitioner's pleadings and the State court's disposition of his case, especially when its reasons are disclosed in an elaborate opinion, that your decisions *are* relied upon as the bulwark upon which rests the plaintiff's claim, and that the State court utterly misinterprets those decisions, giving them, not "due effect," but absolutely *no* effect, we submit, would induce you, with alacrity, to respond to the petitioner's appeal, who vouches you your own oft-repeated and impressive utterances, from the language employed by Mr. Justice Field in *Hartman* v. *Greenhow*, 102 U. S. 679, the first of these adjudications, in 1880: "A contract was thus consummated between the State and the holders of . . . coupons, from the obligation of which she could not, without their consent, release herself," to that masterly presentation of the entire subject by Mr. Justice Bradley, in 1889, in *McGahey* v. *Virginia*, 135 U. S. 668, in which cause he declares that the act of 1871 was a valid act, and that it constitutes a contract between the State and the holders of the bonds issued under it, and that the holders of the coupons of said bonds are entitled to use them in payment of State taxes. "This," he says, page 668, "was determined in all the cases on the subject"—in all—"that have come before this court for adjudication." "This question," adds the distinguished justice, impressively, "therefore, may be regarded as foreclosed and no longer open for consideration."

McCullough has thus been denied rights under the United States Constitution, Section 1, Article III., Section 1, Article IV., and Section 2, Article VI.; and under Section 709, Revised Statutes.

As already said, it is a general principle of law and of pleading that one who asserts a claim in court thereby claims and relies upon every legal right which is his in support thereof, whether under the general statute, the common law, or the law as interpreted and established by the decisions of those courts which are the ultimate expounders of the laws of this country. If so, then McCullough, when he filed his petition below to procure the specific performance of his coupon contract, which he did subsequent to the decisions of the Supreme Court to which we refer, thereby asserted, and claimed, and relied on a right, privilege, or immunity, and exercised an authority secured to him by these decrees, and, therefore, by and under the Constitution and laws of the United States.

These decrees and authority were that all holders of coupons had an absolute contract right to pay their taxes therewith, which included the right to resort to and avail themselves of the identical legal procedure which McCullough adopted to procure the execution of their contract, and could not be lawfully deprived of either, and that both contract and the right to the remedy were protected by the Constitution and laws of the United States. (*Antoni* v. *Greenhow*, 107 U. S. 769, and *McGahey* v. *Virginia*, 135 U. S. 662, and cases cited.) The Virginia court, in its opinion, which in Virginia is made part of the record, refers to, and in terms interprets, these decisions adversely to the plaintiff, and in terms makes its interpretation the ground of dismissing his petition (and that, too, without requiring restitution to him of his money and his coupons which he had given to the collector, in order that he might avail himself of this remedy), and of its decision that he had no contract and no remedy at all. We respectfully and earnestly submit that, as the mere claiming a Federal right, even though the claim be ignored by the State court, or be colorable only (*Smith* v. *Greenhow*, 109 U. S. 671), would present a case within the jurisdiction of the Supreme Court to review, the actual adjudication of such a right by the

State court should also suffice, whether expressly claimed or not. For often might it occur, as in fact it did occur in the case at bar, that the plaintiff would have no suspicion whatever that any Federal right of his would be denied him by the Court of Appeals, and he would, therefore, have no thought to specifically assert any claim to any of his Federal rights, and yet the court might itself introduce such a question into the record as the Virginia court did here, and decide it adversely to him. So that, if the rule limits appeals to cases in which the Federal right was actually claimed in the trial court (it could not be claimed in the Court of Appeals, that being a court for appeals only), the petitioner would have no redress whatever, although a right of the most sacred character, one secured to him by the Constitution and laws of the United States, had been denied. And observe, that if the Federal question be one concerning "an authority exercised under the United States," it is not required by the judiciary act that it be "specially claimed."

In *Dupasseur* v. *Rochereau*, 21 Wall. 130, Mr. Justice Bradley said for the court: "Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, ... a question is undoubtedly raised, which, under the act of 1867, may be brought to this court for revision. The case would be one in which a right or title is claimed under an authority exercised under the United States, and the decision is against the right or title so set up. It would thus be a case arising under the laws of the United States establishing the Circuit Court and vesting it with jurisdiction, and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court over cases arising in and decided by the State courts. The refusal by the courts of one State to give effect to the decisions of the courts of another State is an infringement of a different article of the Constitution, to-wit, the first section of Article IV., and the right to bring such a case before us by a writ

of error under the twenty-fifth section of the judiciary act, or the act of 1867, is based on the refusal of the State court to give validity and effect to the right claimed under that article and section.

"In either case, therefore, whether the validity or due effect of a judgment of a State court, or that of a judgment of a United States court is disallowed by a State court, the Constitution and laws furnish redress by a final appeal to this court. We cannot hesitate, therefore, as to our jurisdiction to hear this case."

The above was cited and approved by an unanimous court in *Embry* v. *Palmer*, 107 U. S. 3, wherein it was decided that, "where a State court refuses to give effect to a judgment of the Supreme Court of the District of Columbia rendered with jurisdiction of the case and the parties, such decision of the State court is a denial of the title and right claimed under an authority exercised under the United States and is reviewable by this court. The question we have to determine is whether the . . . Court of Connecticut in the decree complained of gave to that judgment its due effect."

Again, in 1886, the same question was presented to the court in *The Crescent City, &c.* v. *Butchers' Union, &c.*, 120 U. S. 141, and with like result, and also by an unanimous court, which decided "whether a State court has given due effect to a decree or judgment of the court of the United States is a question arising under the Constitution and laws of the United States, and is within the jurisdiction of the Federal courts. . . . The Supreme Court of Louisiana denied to it not only the effect claimed, but any effect whatever."

It is true that in these three cases the judgments of the United States courts relied upon for jurisdiction were specially set up, and rights under them specially claimed. But the effect thereof is only to make it clear that the Federal right thereunder was actually denied by the State court, a fact which sufficiently appears in our case from the opinion

of the Virginia court, which bases its decision upon its interpretation of these judgments, and dismissed the plaintiff's petition accordingly. The whole spirit and intent of the jurisdictional statutes is to provide for an appeal to Federal courts whenever Federal rights are denied, and it should suffice, therefore, if it appear upon the record that such has been done, no matter how the actual question was brought into adjudication, for the Constitution and acts of Congress extend this court's jurisdiction to rights protected by the Constitution, from whatever source they spring (*New Orleans* v. *De Armas*, 9 Peters, 224), and the rights of the coupon holder under the contract to pay his taxes with the coupon are guaranteed and secured to him by the Constitution of the United States (*Poindexter* v. *Greenhow*, 114 U. S. 270); and also, when the question raised is upon a contract alleged to be protected by the Constitution of the United States, it is the prerogative of this court to judge for itself with regard to the *making* of such contract (*McGahey* v. *Virginia*, 135 U. S. 667.)

In *Factors Ins. Co.* v. *Murphy*, 111 U. S. 738, both parties claimed rights growing out of Federal judgments, but neither were specially claimed as Federal rights. The Supreme Court took jurisdiction, deciding that both parties asserted rights under the order and sale, and, therefore, rely upon rights under Federal authority, and as the rights of the plaintiff were denied by the State court, this court has jurisdiction.

In the early case of *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, this court took jurisdiction to review a decision of the State court, which refused to give effect to the decree of this court upon the first appeal therein, upon the ground that there was drawn in question by such refusal the authority exercised under the said decree, which was an authority exercised under the United States. It will be observed that the jurisdiction thus to review this second decree did not in any manner depend upon the Federal question involved in the original case, which was a right or title

under a treaty. On the contrary, the second writ of error brought up the record of the last decree of the State court only, which constituted, together with the mandate, the entire record then before the Supreme Court. There was no claim in this second record of a Federal right which was denied, but the language of the decree of the State court abundantly showed that a Federal right had been denied, and the Supreme Court therefore took jurisdiction. The construction and interpretation of a decree of the Supreme Court necessarily involved the construction and interpretation of the Constitution and laws of the United States, whence its powers were derived, and this was a Federal question.

So, upon the same line of reasoning, this court took jurisdiction in *Osborne* v. *The Bank*, 9 Wheat. 817, because a construction of the powers exercised by the bank required a construction of its charter, and this necessitated an examination of the laws of the United States, which granted the charter. Said the court (p. 827): "Every act of the bank grows out of this law" [the act of Congress which incorporated the bank], "and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law."

Precisely the same principle applies in the many cases involving rights claimed under decrees, sales, or appointments made in the bankrupt or other United States courts, the theory of the jurisdiction being that a right, title, or authority claimed under any such decrees necessarily involves an examination of the powers of the courts in question, and which in turn involves an examination of the Constitution and laws of the United States from which the powers of the courts are derived. If, as the court said in *Osborne* v. *The Bank*, "Every act of the bank arises out of the law of Congress creating it," is it not likewise true that every act of a court arises out of the law creating it?

"This court hath jurisdiction to review decisions of the State courts denying rights claimed under a decree of the

United States bankrupt courts." (*N. O. R. R. Co.* v. *Delamore*, 114 U. S. 501.)

Corporations chartered by Congress may remove suits against them to the Circuit Courts of the United States, on the ground that such suits arise under the laws of the United States, because their authority, as that of the Supreme Court, is exercised under the laws of the United States. (*Pacific R. R. Co.* v. *Myers*, 115 U. S. 14.) Said the court therein: "An examination of the acts of Congress shows that the corporations now before us not only derive their existence, but their powers, their functions, their duties, and a large portion of their resources, from those acts, and by virtue thereof sustain important relations to the government of the United States."

The decision in *McNulta* v. *Lochridge*, 141 U. S. 327, further confirms these views of the grounds of jurisdiction in the class of cases we are considering. Said the court: "But while we think the plaintiff in error is not entitled to immunity by virtue of the statute of 1887, we are authorized by Revised Statute, section 709, to review the final judgments or decrees of a State court where 'any title, right, privilege, or immunity is claimed under . . . any . . . authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such . . . authority,' etc. Now, as McNulta was exercising an authority as receiver under an order of a Federal court, and claimed immunity, as such receiver, from suit without the previous leave of such court, he is entitled to such ruling, whether his claim be founded upon the statute, or upon principles of general jurisprudence. We regard this as a legitimate deduction from the opinion of this court in *Pacific R. R. Co.* v. *Myers*, 115 U. S. 1," which was, that to give effect to a decree necessitated an examination of the laws which created the court.

It is, perhaps, quite worth while to recall that the words "immunity under the Constitution" and "authority under"

the United States were words of enlargement of jurisdiction in the act of 1867, added thereto because of the amendments to the Constitution, and for the distinct purpose of bringing within the jurisdiction of the United States courts all and every Federal right enjoyed by every citizen of the United States. It is also well to remind the court that in *Poindexter* v. *Greenhow*, 114 U. S. 276, you have said that the rights of the coupon-holder in and to his contract are guaranteed to him by the Constitution of the United States, are secured to him by that Constitution. "He is free from all further disturbance, and is securely shielded by the Constitution in his immunity." And you also said that, *should he be assailed, in violation of these rights, "the grounds of the present judgment would be his perfect defence. And as that defence, made in any cause, though brought in a* STATE COURT, *would present a question arising under the Constitution and laws of the United States, it would be within the jurisdiction of this court to give it effect upon a writ of error, without regard to the amount or value in dispute.*"

The judgments of the Supreme Court must be final and conclusive, because the Constitution invests that tribunal with the power to decide, and gives no appeal from its decisions, which are, therefore, the supreme law.

You have considered the contract over and over, after hearing again and again arguments from the most eminent members of your bar in support of every defence that their ingenuity, learning, and research could devise, oftentimes assisted by the reasoning of many of your associates, in dissent. It cannot be presumed, therefore, that you have not also, in your own deliberations, given due weight to the defence now suggested by the Virginia Court, for you have said that you have finally determined that the contract is legal and can no longer be questioned. Surely, then, unless your words are to be treated as without meaning, and the decisions of this great tribunal, this supreme lawgiver, whose decrees the State of Virginia hath, in ratifying the Constitution of the United States, made the supreme law of the

State of Virginia, anything in her Constitution and laws to the contrary notwithstanding, and the supreme duty of all her judges to enforce and obey, are to be regarded as "trifles light as air," the questions herein must be considered as forever closed and at an end.

On the Merits.

This case, like many others which have been exhaustively argued and decided in this court during the last twenty years, arises upon certain tax-receivable coupons issued by the State of Virginia, and is an unexpected continuation of a controversy made by the State in the effort to avoid the obligation of the contract thus made. It does not present any features or defence which have not already been passed upon by this court, and which it has said more than once have been finally settled, and are no longer open to controversy. The sole question is, is or is not the coupon a contract. You have over and over again decided that it is, and so, also, has the Court of Appeals of Virginia until now, when, for the first time, it decrees that it is not. The last determination of this matter in this court was in 1890, when there was argued and decided a group of eight cases, known as the Virginia coupon cases, and which are reported in 135 U. S. 662 under the title of *McGahey* v. *The State of Virginia*. In these Mr. Justice Bradley delivered the unanimous decision of the court, and as he then took occasion in his own matchless manner to present a connected *resumé* of the history, the legislation, the litigation, and the decision of this long-protracted contention, which is, of course, a far better argument in support of your decisions than we can ever expect to make, we are content to refer the court thereto, without further effort on our part to convince you that your decisions were right. Suffice it to say, that after all this *resumé* and re-examination the conclusion arrived at was "that the provisions of the act of 1871 constitute a contract between the State . . . and the holders of the coupons issued . . . in pursuance of said statute."

And let it not be forgotten in this connection, that while there was not unanimity upon other points in some of the previous decisions, there had never, since the first case in the Virginia court, been any difference of opinion whatever as to validity of the coupon contract. In *McGahey's Case*, 135 U. S. 685, the court said that there "may be exceptional cases of taxes, debts, dues, and demands due the State, which cannot be brought within the operation of the rights secured to the holders of the . . . coupons of the acts of 1871 and 1879. When such cases occur, they will have to be disposed of according to their own circumstances and conditions." And proceeding to consider two of the allied cases then being heard all together—Huckles' and Vashon's—the court decided that these were of the exceptional cases, and that the license tax and the school tax involved in them were not payable with coupons. And then, doubtless, anticipating the conclusion which the Virginia court now draws, expressly negatives it, saying that the principles involved in the case of Vashon do not affect the capacity of the coupon to pay the general tax for carrying on the government.

The Virginia court decrees that in view of "the above decision, we declare the whole coupon contract absolutely illegal and void," and yet "the above decisions," as we have shown, expressly declare that, except as to the school and license taxes, it is a valid contract, and not at all affected by the withdrawal from its scope of the excepted taxes named. Its effort to apply the principles of the laws of contract is, if possible, more erroneous still, and the cases cited to sustain the conclusion are, save one, utterly inapplicable, as the excepted one abundantly proves. The contract is indivisible, says the Virginia court, and illegal in part, and is, therefore, illegal altogether; and yet in the same breath almost, it declares that it is divisible, and the part thereof which promises the payment of money is not affected by the vicious part promising to receive coupons in payment of taxes.

In its confusion the Virginia court confounds the consideration given for a promise with the promise itself. It says that the consideration for the promise being illegal, the promise is void; but this, also, is the converse of what you have decided (p. 716), for in the same, *McGahey* v. *Virginia*, in *Vashon's Case*, you distinctly said that a good and valid consideration had been given for the coupon promise, and that the Virginia court erred in holding otherwise, as well as in deciding, what you said it did in that case, *i. e.*, that the funding bills were unconstitutional. Thus, in effect, you anticipated and decided in advance the very question now before you.

Being yet confused, it forgets the well-known distinction which the law makes between contracts *mala in se* and those *mala prohibita*, and which Mr. Justice Story thus explains in *United States* v. *Bradley*, 10 Peters, 343: "That bonds and other deeds may, in many cases, be good in part and void for the residue when the residue is founded on illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period. The doctrine has been maintained, and is settled law at the present day in all cases where the different covenants and conditions are severable and independent of each other, and do not import *malum in se*. There is no solid distinction in cases of this sort between bonds and other deeds containing conditions, covenants, or grants not *malum in se*, but illegal at the common law, and those containing conditions, covenants, or grants illegal by express prohibition of statute. In each case the bonds or other deeds are void as to such conditions, covenants, or grants which are illegal, and are good as to all the others which are legal and are unexceptional in their purport. The only exception is where the statute has not confined its prohibitions to the illegal conditions, covenants, or grants, but has expressly or by necessary implication avoided the whole instrument to all intents and purposes."

In *Gelpecke* v. *Dubuque*, 1 Wall. 222, Justice Swayne

said for the court, speaking of the objections made: "They relate to certain provisions of the contract claimed to be invalid. Conceding them to be so, they are clearly separable and severable from the other parts which are relied upon. The rule in such cases, where there is no imputation of *malum in se*, is that the bad parts do not affect the good. The valid may be enforced. That part of the complaint only which relates to the stipulations claimed to be valid will be considered."

The coupon contract made by the State is the act of the sovereign, and if part be found inapplicable to certain taxes, the necessary conclusion must be that such was the sovereign's intention as to such part, but not as to the residue. If otherwise, and the contract be now construed to be wholly void by any principle of common law, as above indicated, this would be to hold the common law superior to the statute, whereas the true construction should be that any such principle of common law is impliedly negatived by the statute which made the coupon. The coupon statute may be held void as to the school tax because of the constitutional provision, which is the supreme law, but the common law is not supreme, and what a statute says may be done cannot be defeated by any principle of common law.

There is no question here of any illegality of the *consideration* given for the promise contained in the coupon, for that consideration was simply the surrender by the bondholders of their bonds to the State, who gave them, in lieu, others of lesser amount and interest. But the illegality as charged is found in the contract of the coupon alone, the promise. The citations by the Attorney-General showing the effect upon the *promise* of a consideration void or unlawful in part have, therefore, no application at all to the matter under consideration, and those which he names on pages 25 and 26 of his brief abundantly demonstrate the error of the decision he seeks to defend. They say, "when, however, for a legal consideration a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for

so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected and the remainder established." The remainder of the quotation refers to the effect upon the promise of an unlawful *consideration*, but there is no question of the *consideration* here save in the misapprehension of the Virginia court.

In Addison on Contracts, Vol. I., page 1169, note 1, the following is stated as the law: "The general doctrine is that, if the promise and the consideration are each entire, and the consideration is even in part illegal, the contract is void. But when the contract consists of two or more distinct parts which are readily separable, and not in any material sense dependent on each other, one part being valid and the other void, the rule is to enforce that part which is valid. In like manner, a lawful promise is not necessarily impaired by being joined in a contract with an unlawful one, provided the two can be separated; in other words, a person who, upon a good and valid consideration, promises to do two things, one legal and the other illegal, will be bound to the performance of the former, unless the two are so intermingled that they cannot be separated."

Your decision in *McGahey* v. *Virginia*, *supra*, that school and license taxes may be withdrawn from its operation without impairing its effect upon other taxes, necessarily determines that they can be so separated, which, also, so abundantly appears from the terms of the promise itself; it is to be received, it says, in payment of "all taxes," etc., manifestly meaning "any"; and, besides, the courts have time and again decided that it may be separately executed as to dues, or any of the various kinds of debts included in the comprehensive language employed—fines, license taxes, costs of suit, and any monetary demand whatever which the State may make. And, in fact, the statute of 1884, construed in *Vashon's Case*, *supra*, has effectively and easily so arranged, and has separated the promise, as to the school tax, from the residue, without embarrassment or difficulty.

The Attorney-General, on the 8th and 9th pages of his brief, maintains that the repeal by Virginia, on February 21, 1894, of the laws under which McCullough instituted his suit in the Circuit Court of Norfolk necessarily puts an end to this proceeding, and that no further steps can be taken therein. But such was not the opinion of the Court of Appeals of Virginia, for the decree of which we complain was entered in favor of Virginia nearly thirty days thereafter, March 15, 1894. The cases cited by our learned opponent in this respect by no means bear him out; for while the repealed acts did give jurisdiction to the lower court, the appellate tribunals were in no sense dependent upon them for their jurisdiction, and therefore their repeal could not affect cases pending at their bar. McCullough's case, it is true, had been in the Circuit Court by reason of the permission given by the State; but it was in the Court of Appeals by the act of the State itself, and not at all by virtue of any of the repealed statutes. The State, having thus voluntarily become the actor in that tribunal, is subject to all the rules of process and pleading applicable to any other litigant.

We do not for one moment deny that the general rule is that the repeal of statutes giving jurisdiction terminate all proceedings pending thereunder; but there is a well-known exception of no less weight and authority excluding all cases where rights have vested, and this embraces McCullough's case, it having gone to judgment two years before the act of repeal; and, besides, he had given valuable consideration for the privilege he was exercising of verifying his coupons, having fully complied with the conditions imposed, and given to the collector both money and coupons.

Said the court in *Steamship Co.* v. *Joliffe*, 2 Wall. 457: "When a right has arisen upon a contract authorized by statute . . . the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right, and stands independently of the statute."

"Vested rights acquired by a creditor under and by virtue of a statute of a State granting new remedies, or enlarging those which existed when the debt was contracted, are

beyond the reach of the Legislature, and the repeal of the statute will not affect them." (*Memphis* v. *United States*, 97 U. S. 293.)

It will be observed that this repealing act was passed February 21, 1894. Its language is given at the foot of page 9 of the Attorney-General's brief. The decree complained of here was entered March 15, 1894 (Record, p. 10), and validity is thereby given to the repealing act, which takes away from holders of these coupons the sole remedy they have to enforce their contract. But this you have decided, in *Antoni* v. *Greenhow*, *supra*, cannot be done. Therefore the claim of the Attorney-General that you should give effect to the repealing act clearly raises another Federal question for your jurisdiction, you being asked to give effect to an act clearly of the class which you have hitherto determined is obnoxious to the Constitution and laws of the United States.

It is quite true, as the Attorney-General says, that the effect he claims for the repealing act has been given it by the Court of Appeals of Virginia in Maury's case, decided in December, 1895 (23 Southeastern Rep. 757). But that was a case still pending below when the repeal was passed. If the law be as the Attorney-General contends, it was also so when the McCullough decision was rendered; and that it was not then thus applied is another of the many evidences found throughout this record of the attempt of the Virginia court to evade the decision of the Supreme Court that the contract is valid and protected by the Constitution, and destroy it utterly by a decision which this court would not have jurisdiction to review. If McCullough's petition had been dismissed because of this repeal, which deprived him of all remedy under his contract, there could be no question of your right to review.

It seems to us impossible for this court, after the many times it has held that these coupons are binding contracts, to hold now that they are void, and therefore we do not deem it necessary to discuss these matters further.

Very respectfully,

Richard L. Maury
for Plff in error.

No. 19. 3.
Reply Brf. of Maury for P. E.
Filed Oct. 5, 1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 19.

A. A. McCULLOUGH,

vs.

THE COMMONWEALTH OF VIRGINIA.

Reply Brief of

R. L. MAURY & M. F. MAURY,

For the Plaintiff.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1897.

No. 19.

A. A. McCULLOUGH, *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF VIRGINIA,
Defendant in Error.

Reply of R. L. MAURY *and* M. F. MAURY, *Counsel for Plaintiff in Error, to the Supplemental Brief of* R. TAYLOR SCOTT, ESQ., *Attorney-General of Virginia, and further argument as required by the court.*

Before proceeding to the further argument of this case which the court has directed, we will first make brief reply to the three contentions of the supplemental brief of our lamented brother, the late Attorney-General of Virginia.

That distinguished and faithful officer, whose sudden death every Virginian deeply deplores, has insisted that this case should be dismissed because the court has not jurisdiction to review the State court herein, no Federal question having been decided, inasmuch as the State court's interpretation of its own statute must be followed by this court; because, further, that the decision of the State court is without error, and consequently all that you have hitherto decided concerning the legality of these Virginia coupons is wrong; and lastly, because this is, what he calls, a moot case, inasmuch as the statute authorizing the proceeding from which it has grown has been repealed, and the privilege of suing the State withdrawn.

But for the courtesy due, and which we willingly accord to the memory of our eminent brother, we would not deem it necessary now to make direct reply to these contentions, because we have anticipated and answered them already in our previous brief. We content ourselves, therefore, with saying, at this moment, that the rule relied upon in support of the first contention has never been applied to a case wherein the Supreme Court had already construed the statute in question. By comity alone it is that the Supreme Court will adopt the State court's construction of its own statute; but this can only be when the Supreme Court has not already made its own construction, in which event whatever of comity there be requires that the State court should adhere to what it has heretofore decided, and follow the decision of the Supreme Court, which by comity hath made the earlier State decision its own. This feature in the case at bar, that the Supreme Court had already itself decided the question which the State court decided (differently), differentiates it *in toto* from every one of those cited by the Attorney-General in support of the contention. The latest (*Bacon* v. *Texas*, 163 U. S. 208) which he cites clearly has no application, there being no judgment of the Supreme Court in question as here, and no unconstitutional statute of the State given effect as the decision now appealed from does. Indeed, it is expressly stated in *Bacon* v. *Texas*, as reason for the conclusion reached, that there was no such statute validated by the decision appealed from. The presence or absence of a Federal judgment or of an impairing statute has, in a multitude of cases, many of which are set down upon our briefs, been made the ground of this court's conclusions.

The second contention is that upon the merits the State court's decision is right, and therefore that all that has hitherto been decided in this court and in the Court of Appeals of Virginia concerning the validity of these coupons is totally wrong. After the years of labor and investigation which have been given to this subject by the most astute and intelligent members of this bench and of

the Supreme bench of Virginia, and of their bars, we feel confident that such a contention cannot prevail, and that we need not answer further than to quote, as we have already done, your last determination (*McGahey* v. *Virginia*, 135 U. S. 662), that the provisions of the Funding Bills of Virginia *do* constitute a valid and binding contract between the State and the holders of the coupons issued in pursuance thereof, and that this is finally settled and no longer open to controversy.

The third contention is also without force. This is in no sense a "moot case," for the writ of error acts not upon the parties, but only upon the record, and no affirmative relief is asked against the defendant. When the State of Virginia appealed the case to her Court of Appeals, it became her own case, she was then the actor, and the suit was no longer one against the State within the meaning of the prohibition of the Constitution of the United States. (*Cohens* v. *Virginia*, 6 Wheat. 610.) The repeal of the Act under which this proceeding was commenced in the Norfolk court by McCullough, which the Attorney-General relies upon to defeat this appeal, was made before the appeal of the State had been decided by the Virginia court, who, according to the present contention, ought to have dismissed the State's appeal instead of retaining it, as was done, and deciding it in her favor. But we have already shown that such a repealing statute does not affect pending causes, where rights have already vested. (See the last two pages of our previous brief.)

Before commencing the further argument which the court has called for, we beg to commend to your consideration that incomparable opinion delivered by the lamented Justice Bradley for the whole court, to which we have already referred, in *McGahey* v. *Virginia*, 135 U. S. 662, which in the clearest manner possible gives a full and complete history of this prolonged and complicated contention concerning the State's obligation to her creditors. It is a full and exhaustive review and analysis of all the many decisions in these cases, and presents a summary of the

propositions established, which, said that learned Justice, can no longer be questioned or denied, the first of which is, that the provision of the "Act of 1871 constituted a contract with the State of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said statute." And great weight is added to the justice and force of the conclusion then reached, when it is remembered that the consideration exacted from her creditors by the State, and given, which she still retains and enjoys, for the tax-receivable feature of their coupons was the surrender to her upon request of what, if not surrendered, would, principal and interest, now exceed seventy-five millions of dollars, in exchange for which they accepted less than twenty-five millions, bearing interest at a lesser rate.

The case hath its origin by reason of the persistent efforts of the government in Virginia to escape performance of her promises, for which she received and is enjoying this large consideration, and to devise a means of avoiding the obligation of this contract made with her creditors in return for their release, at her request, of the greater part of what was due them. Although time and again this court, and her own courts too, have decided that the contract is valid and binding, both in law and morals, and that the repeated legislation to nullify and destroy it is unconstitutional, null and void, these unworthy efforts, to which nearly all the creditors have been compelled to submit, still continue against the few—her own citizens—who cannot do so.

In 1871 the interest upon the State's bonds being largely in arrear, and there being no prospect of funds to meet the annually accruing instalments, a Funding Bill was passed by the Legislature, appealing to creditors to surrender their evidences of debt, to release one-third (for which they might look to West Virginia), and to accept in lieu a new bond (for two-thirds), whose coupons should be taken in payment for all taxes due the State. The request was promptly granted, and in a short time the greater portion of the debt, some twenty-seven millions of bonds and in-

terest, was surrendered, and eighteen millions of the new bonds, with the coupon, as promised, accepted in exchange, and the entire amount would have been so funded but that the bill was repealed.

But the revenues were still insufficient to meet even the amount of interest thus reduced. Parts of the maturing coupons were paid during the first year, after which payments ceased altogether, and have never been renewed. In order to realize something of their accruing interest, creditors availed themselves of the tax-receivable feature of their coupons, and sold them to Virginia tax-payers, who used them for the payment of their taxes. Such use soon became so general that the larger part of the State's revenues were thus paid, whereupon an Act was passed (March 7, 1872) that they should be no longer so received.

Upon this Act the celebrated case of *Antoni* v. *Wright*, 22 Grat. 833, arose, wherein the Court of Appeals of Virginia decided that the law under which the coupons were issued constituted a contract which the State could not rescind. Except for several unsuccessful efforts to exclude from its operation some special kinds of taxes or dues, which resulted in unvarying affirmation of *Antoni* v. *Wright*, the decision was accepted as a finality, and for twelve years or more these coupons, aggregating annually very large amounts, were taken freely from all who offered them; a regular custom was established throughout the State for tax-payers to buy them from bondholders at a small discount, who thus in effect and indirectly received their interest each year, and laws were passed recognizing and regulating their sale, and providing for their registration and safe-keeping after reception.

And not only so, but in 1879 creditors were again asked to remit a portion of their dues and again take new bonds with coupons, *tax-receivable as before*, but at only half the interest rate, which was done, and the exchange largely made.

Thus there are two issues of these tax coupons, both of which were tendered in the case at bar, and both of which

the Supreme Court has decided are valid, binding contracts, whose holders are shielded and protected in their rights thereunder by the Constitution of the United States. Firmly founded as are the first, the latter are still more so, issued, as they were, so long after all these decisions were made and recognized and observed, it being a familiar rule of construction recognized by the Virginia courts that where a statute has been construed by the courts, and subsequently re-enacted by the Legislature, it is an affirmance and acceptance of the court's decision. (Anable's Case, 24 Grat. 563; *Mangus* v. *McClelland*, 93 Va. 789.) There can be no hesitation in saying that the rights of their owners are to be determined in this court according to the law as it was judicially construed to be when these bonds and coupons were delivered to them, or put upon the market as commercial paper. (*Burgess* v. *Seligman*, 107 U. S. 20.)

In 1884 a law in the same words as that of 1872, which forbade the acceptance of these coupons for taxes, and which *Antoni* v. *Wright* decided was unconstitutional, was passed again, forbidding the reception of aught but money in payment of taxes, and in 1887 it was included in the Virginia Code adopted that year. (Sec. 399.)

When the coupon contract was made, a remedy for its enforcement was by writ of mandamus from the Supreme Court of Appeals direct. In April, 1882, this remedy was withdrawn from holders of coupons. (See Code of Virginia, Sec. 3086.)

On January 14, 1882, another remedy to secure performance of this contract in effect was provided by the Legislature. It is (Secs. 406 and 407, Code of Virginia) given in full on page 1 of this Record, and generally called the "Verification Act." The mandamus repeal left this the sole remedy available to coupon holders, and it so remained until repealed in February, 1894. If its repeal be valid, then the coupon holder is left now without any remedy at all for the enforcement of his contract, although when the contract was made there was an easy, complete,

and efficacious one by mandamus. The mandamus repeal and the Verification Act were construed by this court in *Antoni* v. *Greenhow*, 107 U. S. p. 770, wherein it was decided that there could be no longer any question as to the validity of the coupon contract; that any act of the State prohibiting the receipt of these coupons for taxes is void, and that the remedies in force when the contract is made are parts of it, and cannot be lawfully taken away unless others of equal efficacy remain. Manifestly, then, the Act repealing the Verification Act is invalid, for that was the only remedy then left to coupon holders, and none was given in its place.

There was also, and all the time has been in force, the general revenue laws of the State, imposing taxes and requiring collectors to levy for them if not promptly paid.

Such were the laws and decisions when the plaintiff in error tendered his coupons (of both issues) in payment of his taxes (except that the Verification Act had not then been repealed), which were refused by the collector by authority of the Act above recited, which forbade the reception of aught but money in payment of taxes, and thereupon and solely because of this refusal, and of these acts, which he relied upon as his authority, this case arose. Plainly but for them he would have taken the coupons when offered, as this court and the Virginia courts had unvaryingly decided it was his duty to do so, and as had been the uniform custom for years before these acts were passed.

But he refused them and required the tax to be paid in money, being commanded otherwise to levy, and the coupons were delivered to the court for judicial determination whether they were genuine and legally receivable for taxes. This inquiry was manifestly one of fact only, for it was to be determined by a jury, *i. e.*, whether or not the coupon was genuine. There was no question of their legal receivability for taxes, if genuine; the statute under which they were being examined by the jury distinctly recognizes them as receivable, if genuine. If there were question of this, it being of legal import was not matter for a jury, and, there-

fore, not to be heard in this case, being a statutory jury proceeding, and, therefore, confined to the issues proper for a jury to determine. The words "legally receivable for taxes," where they occur in the Act, are but words of description of the coupon; there being many others of Virginia issue which do not bear these words, and which, therefore, were not to be included in the provisions of this "Verification Act." (See *Stuart* v. *Virginia*, 117 U. S. 612.)

Thus the case at bar commenced, as the Verification Act provides; the trial court found that the coupons were genuine and legally receivable for taxes; the State appealed, and the Court of Appeals, without question that they were genuine, decided that they were invalid altogether in respect of their tax-paying power; whereupon the plaintiff in error asked and obtained this writ.

The question now is, are the coupons tax-receivable? The trial court, following the Supreme Court, said "yes." The Court of Appeals, "no."

With the reason that the latter gave for its decision the Supreme Court has no concern; it regards the actual determination only, to-wit, that these coupons are not tax-receivable.

It is nowhere pretended that they were not issued by the State, and under authority of the several funding bills, and are not promised to be received for taxes. Nor is it anywhere alleged, directly or indirectly, that there is aught unlawful in such a promise if a mere promise or privilege revocable, if but a spontaneous concession on the part of the Legislature, not constituting a contract, and which may be revoked at will. The same words are found upon the treasury notes of the United States. It therefore follows that if the coupons be not now receivable for taxes, which is the conclusion and decision of the Virginia court, such can only be because that privilege has been lawfully withdrawn, or, in other words, because the law forbidding their reception is valid. But you have decided that this law is invalid. Stripped of all subterfuge and deviation, this is the true logic of this startling decision. And the same

conclusion follows from the major premise of the Virginia court. It decided that the coupon is not a contract—is altogether void; therefore the subsequent Act forbidding its reception for taxes impairs no contract, and so is valid. But the Supreme Court decided that the coupon is a contract, and that the subsequent Act is invalid.

Whether the decision be logically considered or taken illogically, upon the Virginia court's own statement, if allowed to stand, it inevitably and necessarily validates the statutes revocatory just described. In like manner and for the same reasons it also validates every one of the many statutes attacking the coupon contract, all of which are valid if it be no contract, and invalid otherwise. It justifies the act of the collector, under the authority of the State, refusing to accept the coupons offered him, although the Supreme Court has decided that it was his duty so to take them; and basing its decision upon the full faith, credit and effect which the Constitution requires for the proceedings of its Supreme Court, it has regard to but a part of the decision, and gives that part effect to destroy that contract which the whole decision determined was legal and binding, and could not be rescinded, altered or impaired.

And besides, these many assaults upon the rights of coupon holders have been so repeatedly and for so long a period by all the courts, both State and Federal, decided to be obnoxious to the Constitution of the United States, that a rule of property has been thus established which none but this court has power to overturn.

In arriving at its conclusion, which thus validates these laws which you have declared are unconstitutional, the Virginia court construes, and says it gives effect to, the last one of your decisions concerning these coupons; and yet it is now said you have not jurisdiction to hear the cause which thus pretends to give effect to your decree. It is impossible to credit that the machinery of the government is thus defective, for wherever there are rights of the citizen of the United States, there must

go the judicial power of the United States to protect them from invasion or destruction (9 Wheaton, 91); and it cannot be that the framers of the Constitution failed to provide that such a decision should be reviewed by the Supreme Court. If otherwise, consequences of such momentous import would result, that the mere suggestion by counsel so distinguished, however groundless we may deem it, imposes upon us a task of careful consideration and laborious demonstration which we would willingly avoid if we might, and but for which we would be content simply to reply that it is incredible that the Constitution and laws of the United States confer rights upon its citizens, and yet fail to provide for their protection and enforcement by its courts; that there is no remedy when these rights are invaded; or that the relations between the Supreme Court and the State courts are so ill-defined and imperfect that the latter may disregard or pervert at will the decisions and determinations of the law by the former, under the guise of giving them effect, with entire immunity from its revision.

If this were so, our highest court would be supreme to the State courts in name only, although created by the States themselves to be their supreme and final arbiter for themselves and their citizens of every right consequent upon their union; to insure which they have made it the law of the land, a special provision of the Constitution, that their courts and judges should give its judgments full faith and credit, and yield to them that absolute obedience and respect due to the supreme law of the land.

It may be well that the powers vested by the Constitution are not always perfectly described; it was impossible that they should be.

A constitution establishing a frame of government, declaring fundamental principles, and creating a national sovereignty intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States marks the outlines of powers granted; but it does not undertake, with the precision of a

code of laws, to specify all the means by which they may be carried into execution. (Legal-tender case, 110 U. S. 439.)

It is made the supreme law of the United States that the judgments and decrees of this supreme and final arbiter are to have given them full faith and credit as such, as final and conclusive determinations of the matters they have determined and with all the full force and effect that they have in the court which rendered them, and therefore those who interpret them and fail to accept them as being final and conclusive violate the supreme law of the land, and, the decision being adverse, a case arises under the Constitution and laws of the United States of which the Supreme Court has jurisdiction.

The Constitution which the States have made for the guidance and authority of the general government they created—giving up certain of their rights to government for the better security of others—and which was chiefly the work of three great statesmen, of whom two were Virginians, subordinates their own highest courts in matters Federal to the Supreme Court, and imparts to it not only superiority to them in such matters, but also superiority to the other members of the governmental trinity, whose actions also it is empowered to review, overrule, interpret and expound.

Its authors intended that the judicial powers vested should be co-extensive with every right or claim which in any manner should emanate from, or grow out of, the provisions of that instrument.

Its language, therefore, in respect of the scope of the judiciary powers should be taken in its most comprehensive sense, and so as to embrace any and every Federal right, every right of a citizen of the United States, which can be traced to the Constitution as its source, even though it may not appear to be included in any of the special classes named. Every authority exercised, no matter by which department of the government, must of necessity have its origin, directly or indirectly, in the Constitution,

which is its primal basis, and therefore any question concerning such authority must be a "Federal question."

The word "constitution" is the strongest term in the language to designate the fundamental law of a government. Its law is that there shall be but one Supreme Court, whose jurisdiction, original and appellate, is made as broad as the judicial power itself, and whose supremacy makes it the final and conclusive authority in all cases and controversies that it decides. There is no higher authority to review its decisions, and therefore the law of the Constitution, and the agreement of the States which made it, is that the Supreme Court's judgments are absolute and final law to all, that they are final and may not be questioned by any; and being thus by reason of the provisions of the Constitution, 'tis law that they should be so—law of the Constitution and of the United States, and therefore, when decisions are made upon a construction or interpretation of them adverse to those relying upon them, a Federal question is made, of which the Supreme Court has jurisdiction.

"The judicial power shall extend to all cases in law and equity arising under" this Constitution, the laws of the United States, or treaties made, or which shall be made. This classification was evidently adopted for the purpose of emphasis, and not to enlarge or vary the scope of the judicial power from what it would be if the word "Constitution" alone were used, which could not be, for the Constitution being the source of all law and power, all cases which arise under the laws and treaties of the United States fall within the larger classification of those arising under the Constitution, just as all "arising under the treaties" are included in those arising "under the laws." There can be no doubt of what is referred to by the words "Constitution" and "treaties," but perhaps the expression "laws of the United States" is not equally clear. If it only means "acts of Congress" 'tis clear enough. But manifestly it cannot be so limited, as well because at the time the Constitution was adopted there were no acts of

Congress, as because the Constitution declared for a much larger meaning in defining what shall be "the law of the land." It is far more extensive than the statutes only; it means also the Constitution and all that it prescribes or authorizes, whether expressly or by absolutely necessary implication.

We maintain that this word "law," thus used, is by no means intended to be understood as synonymous with "acts of Congress," but is used in its larger and broader signification, which Blackstone gives—that is, "a rule of civil conduct prescribed by the supreme power," etc.—and, therefore, includes not only "acts of Congress," but acts of the other grand divisions of the government as well, as, for example, the proclamations and pardons of the President; his orders as Commander-in-chief; his war measures, as the emancipation; the declaration of peace; and likewise the acts, the decrees, of the greatest of these departments, the Supreme Court. It being authorized to determine finally the law in cases before it, its determination is thus itself made the law; for it is surely a rule of civil conduct prescribed by the supreme power.

The learned commentator just referred to, after giving the above definition of "law," proceeds to explain that the term "laws of England" includes the written and the unwritten laws of the kingdom, or parliamentary law and common law; and that part of the latter are the ancient decisions of the courts.

It is quite true that we cannot sustain our position that the decisions of the Supreme Court are laws, wherever applicable, within the meaning of the Constitution, by pointing to any express provision therein to that effect. But it is likewise true that there is nothing whatever therein which specifically negatives such a contention.

Negation being absent, affirmation should be presumed, being plainly in accord with, and in furtherance of, the theory and intent of that instrument, of which there is strong internal evidence, both negative and positive; for the grant of the power and the declaration of supremacy is a declara-

tion and a law that the exercise of the power shall not be frustrated.

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people. (*Federalist*, No. 31.)

Said the great Chief-Justice from Virginia (in *McCullough* v. *Maryland*, 4 Wheaton, 316): "This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necesrary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue so to arise as long as our system shall exist. In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when in opposition, be settled.

"If any one proposition could command the universal assent of mankind, we must expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts."

And the following from the same eminent source, spoken with reference to the legislative branch of the government, applies with equal force to the judicial: "We admit, as all must admit, that the powers of the government are limited, and that the limits are not to be transcended.

But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the one be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

These rules have ever since been accepted as a correct exposition of the Constitution. They were expressly confirmed by the court in *Hepburn* v. *Griswold*, for whom Chief-Justice Chase said that the words "all laws necessary and proper for carrying into execution" powers expressly granted, or vested, have in the Constitution a sense equivalent to that of the words "laws," "not absolutely necessary," "indeed," "but appropriate," plainly adapted to constitutional and legitimate ends"; "laws not prohibited, but consistent with the letter and spirit of the Constitution"; "laws really calculated to effect objects entrusted to the government."

"The spirit as well as the letter of the law must be observed, and when the whole demonstrates a particular intent, to effect a certain object, some degree of implication may be called in to aid that intent." (Phillip's S. C. Pr. 34.)

And in Story on the Constitution, section 422, these principles are thus expounded: "A constitution of government founded by the people for themselves and their posterity, and for objects of the most momentous nature, for perpetual union, for the *establishment of justice*, for the general welfare, and for the perpetuation of the blessings of liberty, necessarily requires that every interpretation of its powers should have a constant reference to those objects. No interpretation of the words in which these powers are granted can be sound which narrow down their ordinary import so as to defeat these objects."

It is upon the application of these rules of construction

that this court has of latter years recognized as constitutional the exercise of powers far in excess of what was considered to be their limits before the necessity for their exercise arose, notably in regard to cases maritime and of admiralty, of legal tender, of the prize cases, the civil rights cases, and many others growing out of the changed condition resulting from civil war, of which jurisdiction was taken, not being actually prohibited, because of the imperative nature of the circumstances which demanded relief.

It is apparent that the expression "laws of the United States," used in conferring jurisdiction, does not mean "Acts of Congress" only. When that expression was framed, there were no "Acts of Congress," and the Constitution itself, in another clause, gives a different definition, including both Constitution and treaties as sources of "laws of the United States." There is here much "law of the United States" which was not made by Congress. For example, there is something of the common law, there is a deal of equity law, expressly referred to in the Constitution; there is much of the laws of evidence which consist in the general principles which the Federal courts have adopted and established, to be found in their reported decisions and deliverances, together with such statutory regulations as Congress has seen fit to enact for their guidance (Spear, Fed. Juris. 425); laws commercial and international, and of admiralty, and laws maritime, which the Supreme Court holds is that general system of law which was familiar to lawyers and statesmen when the Constitution was adopted. (The Lottawanna, 21 Wall. 558.) There is also martial law, the President's proclamations and war measures (20 Wall. 626), and the laws of the States when administered by the Federal courts in the States whose construction of State statutes are thenceforward part of the State statute itself, and as such State and Federal law both. There are the rules of pleading and practice adopted by the Supreme Court. Its decisions, too, are law to the parties, and when repeated and reiterated become laws of property, and if of a general and public

character, as, for example, that a statute be constitutional, or a power invalid, are law for all who claim thereunder that the statute is constitutional, or the power invalid.

Manifestly, then, the expression "laws of the United States" cannot mean "acts of Congress" only. It embraces them of course, but also much other law from other sources. It means the rule of civil conduct prescribed by the supreme power in the United States; and is synonymous with the great word "constitution," designating all fundamental law, all the law of the land, all the rules of civil conduct prescribed by the supreme powers. It is made the duty of the President to take care that the laws be faithfully executed (Article II.), which he assumes by his oath of office, whose words "to preserve, protect, and defend the Constitution," are deemed all-comprehensive, because all law emanates from the Constitution and its provisions, and if it be "preserved, protected, and defended," all that it commands and directs will of necessity be faithfully performed. For the same reason, and that the greater includes the less, the Act of Congress of June 1, 1789, considers that the oath, "to support the Constitution of the United States," required of all Federal and State officers, is all-sufficient.

If "acts of Congress" alone were meant by the expression, "laws of the United States," would not the former expression have been the one used, and invariably used, whereas we find in the Constitution that laws are sometimes called "regulations of commerce," sometimes "rules of naturalization," "laws of bankruptcy," "laws of the Union," etc.?

This larger meaning of the word "law" in the provision that "no State shall pass any law impairing the obligation of contracts" has, in effect, been adopted by the Supreme Court and in the Judiciary Act. (Rev. Stats., Sec. 709.)

As Congress may not enlarge the jurisdiction of this court beyond what the Constitution confers, the language of the Judiciary Act is to be understood in this respect as simply defining the scope of the jurisdiction conferred by the Constitution, and, therefore, its provision for writs

of error to State courts in cases of contracts and impairment is but a definition of what the provision means. The Constitution says that the contracts shall not be impaired by State law, but the Judiciary Act uses the words "statute of, *or an authority exercised under any State*"; that is to say, that any evasion or denial of contract rights by any functionary of a State, for which authority, real or pretended, from one or the other of the departments of the government is claimed, is an impairment of the contract within the meaning of the Constitution, and the official action is a "law" within the meaning of the Constitution.

The decisions of the Supreme Court fully support this conclusion. The ordinary acceptation of the words are that no *State Legislature shall enact any law* impairing the obligation of contracts. But to this narrow meaning these words are not now confined, and though somewhat strictly defined at first, as need has arisen their scope has been enlarged to effectuate their intention, until now they have been considered fully as comprehensive as we have just written. When States sought to evade this prohibition by amending their Constitutions, it was promptly determined that such an amendment was a "law" within this meaning. And so, also, was a city ordinance (*Winston* v. *Charleston*, 2 Pet. 249), an act of a county court (*Wright* v. *Nagle*, 101 U. S. 793; *City R. R. Co.* v. *Citizens R. R. Co.*, 166 U. S. 559), a law of the Confederate States (*Williams* v. *Bruffy*, 96 U. S. 176; *Ford* v. *Surgett*, 97 U. S. 594), the act of tax collector attempting to collect a tax. (*Given* v. *Wright*, 117 U. S. 656.)

Such have all been decided to be laws of a State impairing a contract within the meaning of the Constitution, meaning acts done by alleged authority of some part of a State's government. It has also been decided that a remedy can no more be taken away by subsequent *judicial* decision than by subsequent legislation. (*United States* v. *Muscatine*, 8 Wall. 575.) And Mr. Spear (p. 576) writes, "Whatever the State regards as law is a statute within the meaning of

these words of the Constitution." (Also *Williams* v. *Bruffey*, 96 U. S. 176). And, *Bacon* v. *Texas*, 163 U. S. 216, the court says that the words "law of a State" do not mean only a statute, or a constitution.

In very fact, therefore, it is the attempted exercise of authority by a state-functionary, adversely to the contract, which is the foundation of the Federal question, and not alone the existence or passage of such a law by the State, because, strictly, there can be no such law; the Constitution forbids. In the case of *Poindexter* v. *Greenhow*, 114 U. S. 270, the Federal question arose by reason of the Act of January 26, 1882, forbidding the reception of coupons for taxes, and jurisdiction was taken, notwithstanding that the court held as just above stated, saying, "That (law) it is true is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, certainly, in contemplation of law it has not done." (Page 288.)

We contend, then, that cases arising under the "laws of the United States" are also included in "cases arising under the Constitution," whence law proceeds, and therefore, whatever is done authoritatively, no matter by or under which department of the government, is done by authority of the Constitution, and cases arising "arise under the Constitution." The case at bar thus arises, because its correct decision depends on the construction of the protection afforded by the Constitution to contracts and to the decrees of its Supreme Court. (*Cohens* v. *Virginia*, 6 Wheat. 264.)

The description of the cases of which the Supreme Court shall have jurisdiction is found in sec. 709, R. S. What are "cases arising under the Constitution and laws of the United States" are in effect defined by that section to be not only those arising under "statutes," but "under authority exercised under the government," as well as those involving rights, privileges and immunities derived from the United States. It may not be assumed, therefore, that the expression "laws of the United States" means only "statutes of the United States." All that the

government administers and considers as law falls within the definition of the term.

Now, it cannot be denied in this forum that a law has been passed which has created a contract with the plaintiff in error, for this court has so decided. Nor, for the same reason, can it be denied here that the Legislature has passed an act which, if valid, impairs that contract; nor that the decision complained of in destroying the contract validates the act last referred to, thus not only validating that which the Supreme Court has said is invalid, *i. e.*, the latter act, and invalidating what it has said to be valid, *i. e.*, the coupon contract, but legalizing an act which the Constitution forbids, and making that to be law which it says shall not be.

But leaving out of consideration for the present the effect upon the case of the previous adjudications on these statutes, we see two directly antagonistic statutes of Virginia, both of which cannot be legal, either of which may be, if the other is not. If the first effectuated a contract, the second is void; if it did not, the second is valid. The Virginia court adjudicated that the first did not effectuate a contract, and thus, without mentioning it, as effectually validated the second as if that itself had been the actual subject of adjudication, as, in fact, it had been in the previous "Virginia coupon cases," when it had been adjudged invalid. And the result totally destroys the plaintiff in error's coupons. It is no answer to say that such would be the direct result of the decision complained of even though the forbidding statute had never been passed, which is, therefore, supererogatory, and, whether valid or invalid, is of no consequence, now that it has been decided that there is no contract; for, in the first place, it cannot be said in this court that there is no contract, for it hath finally decided the reverse; and, in the second place, it is the passage of such an act which the Constitution forbids—the attempt to invade the contract; and this inhibition is equally violated whether the act or the attempt be supererogatory or not. The reasoning of the court below, by

which it arrives at its decision, can have no effect to exclude the Federal question. The Supreme Court hath regard to results alone, and if the effect of the decision be to validate any act obnoxious to the United States Constitution, jurisdiction will attach. It is the passage of the impairing act, the bare attempt to impair which is obnoxious, and upon which jurisdiction depends, and not at all that the act is being enforced, or whether it be enforced at all. It is the existence of a subsequent law which sustains the jurisdiction, which only fails "when the State court decides against a right claimed under a contract, *and there was no law* subsequent to the contract." (*Water Works Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18.) So that though the contract be evaded by other means and without reference to the subsequent act, and a case thus arise, although there be no attempt to enforce or observe the obnoxious statute if it be upon the statute book, even but as a dead letter, if the decision disposes of an objection fatal to its validity, it is thus indirectly validated and the Constitution of the United States violated.

It has often been held by the Supreme Court that the construction of its own statute by the highest court of a State will be followed by the Supreme Court, even in matters of alleged contract claimed to be protected by the United States Constitution. "Otherwise we would have to review every case which decided that there was no contract." But that objection has no application here, this court having already decided that there is a contract. You follow the State court's construction of its own statute, because such construction is part of the statute itself, *i. e.*, the laws of the State, and Federal courts are commanded to give effect to the law of the State where they are sitting. After such a decision by State courts, therefore, there could not be question of contract, because the State court had held that there was no contract, and thus made a law which the Federal courts must regard. No case of alleged contract thus decided could be brought to the Supreme Court upon appeal, because the decision of the State court is

State law. In the supposed case, it would, therefore, be State law that the alleged contract was not such, and there would be no case of contract for the Supreme Court to review. But, however this may be as to cases of first impression in the State courts, its ha no relevance to a case like this, where the Supreme Court hath already decided these very questions, and determines that there is a contract. *Its* decision, then, becomes part of the statute, part of the law, and State courts may not disregard it, for it has become a rule of conduct of the Supreme Court, a law of the United States, and is authority in this case—authority under the United States—for the payment of taxes with coupons, the right to do which is an immunity and privilege thereunder, a civil right which none can abridge, any denial whereof, or attempt at abridgment, is forbidden by the Constitution. Similarly, effect is given to the recent law repealing the Verification Act, a repeal repugnant to the Constitution, because the remedy afforded by the Act is the sole remedy left to coupon holders by which they could enforce their contract. The repeal was passed February 21, 1894, and will be found on page 9 of the Attorney-General's brief.

The decision complained of also gives an effect to the general revenue law of the State which otherwise it would not have. Tax-collectors, acting under it, are exercising an authority under the State to compel the payment of taxes in money, even though coupons might have been tendered therefor; which compulsion is repugnant to the United States Constitution if the coupon promise be a contract. If it be not a contract, this exercise of authority is lawful; and, if it be so, it is because of the Virginia decision; for the Supreme Court has decided that any such action by a tax-collector, after a tender of coupons to him, is unlawful and altogether without authority. (*Poindexter* v. *Greenhow*, 114 U. S. 270.)

It is of no consequence that the revenue act made no reference to coupons in the authority given to the tax-collector, or, as has been demonstrated already, that the decision of the Virginia court makes no reference to it. The

revenue law, in this respect, is a part of the general system of the Legislature's assault upon the coupon contract, but for which this case could never have arisen; and if the decision complained of be correct, the authority of the tax-collector to levy upon and take the property of all who do not pay their taxes (in money), not excepting those who tender coupons therefor, is not obnoxious to the Constitution; and effect is thus given to this law also. Citations have already been made, in our previous brief, to cases wherein the impairment upon which the Federal question arose was attributed solely to the action of a tax-collector who erroneously construed the general revenue law to give him the authority he claimed. *Given* v. *Wright*, 117 U. S. 656; *Yazoo Co.* v. *Thomas*, 132 U. S. 174; and *Railroad Co.* v. *Alsbrook*, 146 U. S. 293, were all cases wherein the tax-collector attempted to collect taxes [upon property claimed to be exempt under contracts] under authority of his construction of the general revenue law, which made no special mention of the property in question. In all of them the State court decided that there was no contract exemption. In all, the Supreme Court took jurisdiction, because the decision whether or no there was a contract exemption necessarily determines the legality of the authority exercised by the officer, which was in violation of the Constitution if there was a contract. In none of these cases was there any legislative attack upon the contract, or other unconstitutional legislation. The unauthorized act of the officer was all that was complained of; and this act by this officer, reverting to the Constitution, the unique source of jurisdiction, was held to be within its meaning of "a law impairing the obligation of a contract," because recognized and administered as law by the State. In *Given* v. *Wright*, the State court held, upon general principles, that the contract exemption claimed had long ago perished by non-user. In *Yazoo Co.* v. *Thomas*, the State court's decision that there was no contract exemption was also upon independent grounds. In *Railroad Co.* v. *Alsbrook*, the State court construed the exemption claimed as not in-

cluding a part of the property for which taxes were demanded, and then gave effect to the authority of the officer who held that the property was taxable, and that there was no exemption from the operation of the law under which he acted. If there was a contract, an exemption, its obligation was impaired; and as the inquiry whether there was or was not was necessarily passed upon, the writ of error was allowed. We pray to refer also to the recent cases of *Bacon* v. *Texas*, 163 U. S. 208, wherein the court says that it suffices if the judgment complained of "in any manner gives the slightest effect to the subsequent Act;" *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 650; and *L. & N. R. R. Co.* v. *Louisville*, *Id.* 711, wherein the law of jurisdiction, *pro* and *con*, is again fully discussed, and defined to be as we have stated above.

The Virginia court evidently sought to evade the review of this court by grounding its decision as well upon the construction of the Constitution of Virginia, which antedated the coupon, as upon the application of general principles of the common law of contracts. But this is a vain attempt, for "the grounds upon which the State court held the contract . . . invalid in no way affects the jurisdiction of this court. The legal existence of the contract itself and its proper construction is necessarily involved in the question of alleged impairment (*Mobile and Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 436), and, "Where it is charged that the obligation of the contract has been impaired by the State law . . . . *as administered by State authorities*, and the State courts justify such impairment by the application of some general law to the facts of the case, it is our duty to inquire whether this justification is well grounded. If it is not, the party is entitled to the constitutional protection." (*Given* v. *Wright*, *supra.*) And, besides, the general principles of the common law of contract belong to the domain of general jurisprudence. "In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authorita-

tive intimation from any quarter that such statutes were involved. The Legislature affirmed their validity in every respect by an implication equivalent in effect to an express declaration. And during the period covered by this enactment neither of the other departments of the government of the State lifted its voice against them. The acquiescence was universal." (*Township of Pine Grove* v. *Talcott*, 19 Wall. 677.)

These words, although not spoken of the Virginia bonds, are in all respects most applicable, because after the early decision of *Antoni* v. *Wright*, in 1873, which decided that the coupons were valid obligations of the State, contracts, there was unbroken acquiescence by all; laws were passed recognizing and providing for the reception of the coupon for taxes, and a second Funding Bill was passed in 1879, which recognized the entire issue of 1871 as valid and binding, and made provision for the whole amount to be refunded, and that in exchange therefor other coupons [at a lesser rate] should be issued, carrying the identical tax-receivable feature which had been passed upon in *Antoni* v. *Wright*, thus in effect ratifying that decision by Act of the Legislature (*Mangus* v. *McClellan*, 93 Va. 789.)

Thus has been drawn in question both the validity of a statute and an authority exercised under a State, and an effect given to both repugnant to the Constitution.

It having been decided by the Supreme Court that every holder of these coupons hath right to pay taxes therewith, the exercise of this right by plaintiff in error is an exercise of authority under the United States, and a State court's decision, which itself states is based upon the interpretation of the effect of these Supreme Court decisions, necessitates a construction of the constitutional provision concerning the effect to be given to judgments from other States, and thus raises the Federal question, whether the Constitution has been properly construed and the judgments given full faith and credit. (*Huntington* v. *Altrell*, 146 U. S. 657.) Such judgments must be given the same effect as in the courts which rendered them. (*Cheever* v.

Wilson, 76 U. S. 108; *Chew* v. *Brumagen*, 80 U. S. 407, Rev. Stat., sec. 905.) The Virginia court, referring to the Supreme Court decisions, said: "In view of these decisions, and being satisfied that the coupon feature of the Act of 1871 . . . is stained with the vice of illegality, which renders the whole coupon contract illegal and void, we take, in *view of the said Supreme Court's decision*, the one additional necessary step and declare the whole coupon contract absolutely illegal and void." (*Commonwealth* v. *McCullough*, 90 Va. 619.)

It may not be said that the plaintiff in error cannot claim any right under these judgments because he was no party thereto, for though personal, they are also general, constituting, as they do, a statute and a contract of the State. They are, therefore, of a public nature, and affect all equally whose rights are dependent upon them, or who claim the same rights under the same statute and contract which they adjudicate. A State court's construction of a statute of its State is part of the statute, and thus affects all, and a decision of the Supreme Court must be equally comprehensive as to matters actually litigated.

In tendering coupons for his taxes, the plaintiff in error was exercising an authority, right, privilege, or immunity under the State and also under the United States; that is to say, under decisions of the Supreme Court, which said: "It may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same after maturity in absolute payment of all taxes, debts, dues, and demands due from him to the State." (*McGahey* v. *Virginia*, 135 U. S. 668.) This right thus determined is of the most absolute character, because when exercised he "is free from all further liability in respect of said tax" (p. 184), and the duty is imposed upon the tax collector to receive the coupons offered as if they were money, and thus because, said the court, the Act from which the right issues is, by force of the Constitution of the United States, protected from impairment or repeal, and made the unchangeable law of Virginia. (*Poindexter* v. *Greenhow*, 114 U. S. 279.) So

absolute is this right that he who invades it, even under color of law, is a trespasser; for he who thus exercises it "has paid his taxes, and the collector had no authority to attempt to enforce other payment. In doing so he ceases to be an officer of the law, and becomes a private wrongdoer." It is a simple case in which the officer, a natural private person, has unlawfully, with force and arms, seized, taken, and detained the personal property of another. (P. 283.) "*The Constitution of the United States* and its own contract, both irrepealable by any act on its part, are the law of Virginia, and that law made it the duty of the defendant to receive the coupons" (p. 288), and thus created the right of the tenderer to have them received.

Such being the determination of the Supreme Court, he who tenders thereafter, as did the plaintiff in error, exercises an authority as well under this decision as under the Constitution itself. "The mandate of the State affords no justification for the invasion of rights secured by the Constitution of the United States; otherwise that Constitution would not be the supreme law of the land." (P. 292.) "His right was to have his coupons received." (P. 299.) "The Constitution of the United States guarantees the right . . . to pay his taxes in coupons. The discrimination is made against him in order to deprive him of that right, and, if permitted, would have the effect of denying to him all redress for a deprivation of a right *secured him by the Constitution*. To take away all remedy for the enforcement of a right is to take away the right itself. That is not within the power of the State." (P. 303.)

The cases of *Dupasseau* v. *Rochereau*, 21 Wall. 130; *Embry* v. *Palmer*, 107 U. S. 3, and *Crescent City Live Stock Co.* v. *Butchers' Union*, 121 U. S. 141, are all authority for the position that "when a State court refuses effect to the judgment of a court of the United States *rendered upon the point* in dispute, a question is undoubtedly raised which may be brought to this court for revision (*Dupasseau* v. *Rochereau*, *supra*); that a party relying upon such judgment does so under an authority exercised under the

United States, *i. e.*, under the laws of the United States establishing the court, and, therefore, under the Constitution which authorizes these laws; and that it is a question for the Supreme Court to determine, if the decision is adverse, whether or not that effect has been given which the Constitution requires. In *Embry* v. *Palmer* the suit was upon the judgment itself by the judgment creditor, and the Supreme Court took jurisdiction to determine whether proper effect had been given it, and affirmed the decree. The jurisdiction, therefore, is not dependent upon error in the decree, but upon the fact that the judgment was relied upon, and was construed adversely by the court.

In *Dupasseau* v. *Rochereau* and *Crescent City Live Stock Co.* v. *Butchers' Union*, as in the case at bar, the judgment was not the foundation of the suit, but was relied upon collaterally to support the claim or the defence made. In the first named, as here, the defendants were the same, but the plaintiff not, and the judgment, which was *Rochereau* v. *Suave*, was adduced in *Rochereau* v. *Dupasseau* to show that the then issue between the latter had been finally determined by the former judgment. As in *Embry* v. *Palmer* the Supreme Court took jurisdiction to determine whether due effect had been given to the judgment, and found that it had.

In *Crescent City Live Stock Co.* v. *Butchers' Union*, a judgment of the United States Circuit Court was relied upon by the defendant to show "probable cause," and, therefore, mitigation of the damages claimed. The Supreme Court took jurisdiction, saying: "The question whether a State court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the Federal courts by proper process." The Supreme Court found that proper effect had not been given, and the decision was reversed. It is noteworthy, as indicating how readily jurisdiction sometimes attaches, that the judgment in controversy had previously been set aside by the Supreme Court, and yet its construction furnished ground for jurisdiction.

Said the court, in *Huntington* v. *Altrell*, 146 U. S. 657: "When duly pleaded and proved in a court of that State, they have the effect of being not only *prima facie* evidence, but conclusive proof of the rights thereby adjudicated, and a refusal to give them the force and effect in this respect which they had in the State (court) where rendered denies to the party a right secured to him by the Constitution and laws of the United States." It will be observed that the judgment relied upon in this case was against only one of the several defendants to the case reviewed, and he had no actual interest in that controversy, which was to enforce payment of the judgment from property which he had previously conveyed to the others.

In *Great Western Railroad Co.* v. *Purdy*, 162 U. S. 335, the plaintiff relied upon an order of assessment as a judgment of another State, which the State court denied. Said the Supreme Court: "The question whether that court declined to give full faith and credit to a judicial proceeding of a court of another State, as required by the Constitution and laws of the United States, was necessarily involved in the decision. This court, therefore, has jurisdiction of the case, but must judge for itself of the true nature and effect of the order relied on." And it decided that the order was in no manner a judgment, and affirmed the court below.

In the case at bar the validity of the Act under which the coupons in controversy were issued, and the abiding nature of their contract, had been determined by the Supreme Court, and its decisions were relied upon in support of the judgment of the Circuit Court of Norfolk appealed from, and also show that the matter then in controversy had been litigated and finally settled. The Court of Appeals considered and construed these decisions, and under the shallow pretence of giving them effect did just the reverse, and interpreted them adversely to the plaintiff in error.

Surely, then, the Supreme Court hath jurisdiction to determine, as in the cases just cited, whether proper effect was given to decisions thus drawn in question.

Indeed, this court hath practically actually decided that

it hath jurisdiction of this case, it having said in *Poindexter* v. *Greenhow*, 114 U. S. 276, that the coupon holder's rights in and to his contract are guaranteed and secured by the Constitution of the United States, and that, should they be violated, "the grounds of the present judgment would be his perfect defence; *and as that defence made in any cause, though brought in a State court, would present a question arising under the Constitution and laws of the United States, it would be within the jurisdiction of this court to give it effect upon writ of error, without regard to the amount or value in dispute.*" The relator is entitled to the remedy he asks, which can no more be taken from him by subsequent judicial decisions than by subsequent legislation. (*U. S.* v. *Muscatine*, 8 Wall. 575.)

But the passage of the Fourteenth Amendment has put at rest many of these questions as to the extent of the jurisdiction of this court, which heretofore have been the subject of difference of opinion.

Valuable rights and privileges without number are now granted and secured by the Constitution to citizens of the United States, as distinguished from, and additional to, those of citizens of different States, none of which rights may with impunity be invaded, even by a State. It, therefore, furnishes an additional guaranty against any encroachments, in any manner whatever, by a State, or any official thereof, upon any of those fundamental rights of a citizen of the United States which are his by reason of the stipulation or provision of the Constitution. (*United States* v. *Cruikshank*, 92 U. S. 567.) It places them under the guardianship of the national authority, and secures protection to all its citizens against any abridgment of their rights from any source, or under any pretext whatever. "The privileges and immunities of citizens of the United States, of every one of them, are secured against abridgment in any form by any State." (Slaughter-house cases, 16 Wall. 101.)

Not only now, therefore, are contract rights, and the few others aforetime specified, protected from impairment by State laws, but it is forbidden that any privilege or any

immunity of such citizen shall be abridged in any manner or by any means. It therefore follows that, just in proportion as the scope of these constitutional prohibitions has been enlarged, so, also, has been extended the comprehensiveness of the term "Federal question" and the limits of the jurisdiction of the Federal courts; for, clearly, any infraction of these new inhibitions would be a case arising under the Constitution and laws of the United States, within the meaning of the Judiciary Act.

A distinction between citizenship of the United States and citizenship of a State is by this amendment for the first time clearly recognized and established; distinct rights and privileges, of many kinds and greatest value, of the former are for the first time recognized and established, and, therefore, for the first time taken under the special protection of the Constitution and committed to the special guardianship of its courts.

In the Civil Rights cases, 109 U. S. 3, the purposes and effects of this amendment are clearly described, and although there was dissent as to the decision, all were of one mind that the amendment nullifies and voids all State action of any kind which impairs or abridges any of the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property and without due process of law; rights which the United States creates or confers it necessarily has the right and the duty to preserve and protect. Positive rights and privileges are undoubtedly secured by this amendment; secured by prohibition against any State law or State proceedings abridging them.

Your latest explanation of its prohibition is found in *Chicago, B. & Q. R. R.* v. *Chicago*, 166 U. S. 233, in these words: "The prohibition of the Fourteenth Amendment refers to all of the instrumentalities of the State; to its legislative, executive, and judicial authorities, and, therefore, whoever, by virtue of public position under a State government, deprives another of any right protected by that amendment, against deprivation by the State violates the constitutional inhibition."

The privileges and immunities thus protected are those which arise from the nature and essential character of the national government and the Constitution of the United States. They are those to secure which the government was formed and established. Experience had taught that a national government was required for national purposes —that the State governments alone were not sufficient for the complete protection of the people; and for that reason the people of the States, in order to form a more perfect union, "establish justice," etc., adopted the Constitution for their mutual protection, security, benefit, and enjoyment. (Kremler's case, 136 U. S. 448, and those previously cited.)

In the beginning it was considered sufficient to trust entirely, save in a few specified cases, to the State government for the protection of all civil rights; but experience has taught differently in this respect also, and the Fourteenth Amendment was deemed necessary to protect a State's own citizens even from hostile legislation, perversion of justice, and in the full enjoyment of their legal rights, and to that end to "impose additional limitations on the States, and confer additional power upon the United States." (Slaughter-house cases, 16 Wall. 82.)

Of such privileges and immunities, none can be of more exalted importance than the right of one member of the community—one citizen—that all of his co-members, his fellow-citizens, shall recognize and respect the supremacy of their Constitution, and obey and support its requirements; for this allegiance, which it is the duty of all to give, and which correlatively it is the right of all that it shall be given, is the very foundation-stone upon which their Constitution rests. It is, therefore, the right of every citizen of the United States that the supremacy of the several branches of the government in their several departments, as provided by the Constitution, shall be fully recognized and respected. It is his right that the Supreme Court shall be recognized and obeyed by all as supreme, and its decisions accepted by all as ultimate and final. Any perversion of its judg-

ments, therefore, or failure to give due force and effect to its decisions by State courts, under pretence of an interpretation of its meaning and intended effect, or an application of the principles of common law, is an assault upon its high prerogatives, a denial of its supremacy, and an abridgment of the rights of every citizen of the United States, who, by their Constitution, have ordained that its decisions shall be questioned by none, but shall be final and conclusive, and its decrees shall be obeyed and respected as such by all.

As already said, the case at bar presents a feature not shown in any of the many cases which have been adjudicated here upon the question of jurisdiction. It is, that the issue adjudged by the State court had previously been determined by this court. It has again and again construed these funding statutes of the State of Virginia, and decided that they are constitutional, and that the coupons issued by their authority are valid and binding obligations of the State of Virginia, so that, when the Virginia tribunal failed to recognize the finality and conclusiveness of the decision of this court, and itself adjudged precisely the reverse, under the shallow pretence that the principles of the common law necessarily produced this result [as if the common law in Virginia can be superior to the Constitution of the United States!], it has invaded the prerogative of this, the Supreme Court, nullified its decree, disregarded the requirements of the Constitution, and thus, directly and indirectly, abridged McCullough's privilege and immunity as a citizen of the United States, that this august tribunal shall be the Supreme Court of the United States, and its decisions final and conclusive of all matters which it determines.

And, indeed, the decision of the Virginia court is also obnoxious to the second clause of the Fourteenth Amendment, because its effect is to deprive appellant of his property—his coupon—without due process of law. The authorities of the State having obtained possession of the coupon for the sole purpose of determining whether it be

genuine, which it has been proven to be, have, nevertheless, dismissed the owner from court without its restitution, and the State, the debtor, retains possession of his property, the valuable evidence of her indebtedness, to her own benefit and profit and without aught of compensation to him. In a subsequent case, decided by a successor bench, it was held manifestly unjust not to return the coupons to the taxpayer when his petition for their verification was dismissed, and in that case it was so ordered. (*Maury* v. *Virginia*, 92 Va. 310.) But without this it is submitted that, as the result of the decision complained of is utterly to destroy the value of the coupon in the interest of the State, who is its obligor, while the proceeding in which this was done was instituted and conducted for an entirely different purpose, it cannot be considered due process of law for attaining the result which has been accomplished. The coupon is a promise by the State to pay the sum it names, or to be received in payment of that amount of tax. Payment has long ago been refused, and, the State being non-justiciable, the holder has no remedy for this wrong but reliance upon the tax-receivable promise, and now the court decrees that this alternative is not obligatory, and the State retains the coupon. Thus, in effect, petitioner's property, although genuine, is confiscated to the State without either compensation or due process of law to that end.

If we have been wearisome we beg that our prolixity may be excused in consideration of the serious character of the Virginia court's attack upon the supremacy of this court. Since the momentous case of *Martin* v. *Hunter*, there has never been a State decision likely to entail more grievous consequences if allowed to stand unrebuked, or one which, if imitated, could more seriously abridge the rights of citizens of the United States. Our best efforts are therefore aroused to defeat an attempt so fraught with mischief.

When a record before you upon a writ of error discloses for certain that a constitutional right of the plaintiff has been invaded, your honors have not always been rigid in your requirements as to the manner in which the Federal

question is made to appear, deeming the "how" unimportant if the fact be apparent. It is true that there are decisions difficult to reconcile without careful analysis, but it is also true that there are none declining jurisdiction, wherein it is indisputable that the Federal right was decided, even where Federal protection had not been specially invoked.

The Judiciary Act does not prescribe the manner in which this protection must be "claimed," or how it shall be "specially set up." In *Sayward* v. *Denny*, 158 U. S. 180, it was held sufficient, if called to the attention of the court in some proper way, and the decision of the court was adverse, and in *Chicago, Burlington and Quincy R. R.* v. *Chicago*, 166 U. S. 231, if it appears from the record that such right was set up *or* claimed [*i. e.*, in some other manner] in the State court *in such manner* [*i. e.*, in any manner] to bring it to the attention of the court. If, as stated in the latter case, a mere motion suffices for jurisdiction, even when the record does not show the actual adjudication of any Federal right, why not argument of counsel when the record does show such adjudication? When the record shows that a Federal right has been adjudicated adversely, you have never held it necessary that it should also show that the right adjudicated was specially set up or claimed. The right thus adjudicated is one Federal right, and the right to claim or specially set it up is another, and it is only when the record does not show that the first has been passed upon adversely that the plaintiff must show that he did not waive it, but claimed it in a proper manner, so that the attention of the lower court was called thereto. If the record discloses that the right was passed upon, there is no need to show that it was called to the court's attention. In *Louisville and Nashville R. R. Co.* v. *Louisville*, 166 U. S. 715, you say that it is sufficient if the record shows that the Federal question was decided adversely. The language of the Judiciary Act is in the alternative, that the record must show either an adverse decision *or* that the claim was specially set up; but not both.

We maintain that a suitor claims, within the meaning of the Act, all of his legal rights of every kind appropriate to his protection or vindication, when he institutes his legal proceeding, whether enumerated in his declaration or petition or not. Otherwise an unfriendly tribunal could, upon its own motion, illegally import into the case an issue involving a Federal right in order to decide it adversely, and the abused citizen, having had no opportunity to claim Federal protection of *record*, would be deprived of his right to appeal to this court, if this right was not preserved by the evidence of the record that a Federal right had been decided adversely.

This proceeding, as commenced, was in accordance with the provision of a statute whose declared object was to ascertain whether the coupons tendered by McCullough were genuine, and being a statutory proceeding, and especially because it was a suit against the State, its scope was necessarily confined to that prescribed purpose. The statute, generally called the Verification Act, is quoted in full in the case of *Antoni* v. *Greenhow*, 107 U. S. 771. The preamble states that its purpose was only to ascertain whether coupons tendered were genuine or not, in the interest of the holders, and both preamble and body indicate and provide that if genuine, and, therefore, legally of the issues stamped "receivable for taxes," they are to be so received. When the petition which McCullough filed in the Norfolk court for a jury to ascertain whether these coupons were genuine was called, the Commonwealth, instead of pleading to the issue, which the statute itself directs, offered pleas denying the constitutionality of the Acts under which they were issued. These pleas the trial court refused, holding, doubtless, that the issue thus sought to be raised could not be heard in that proceeding, and the jury having found that the coupons were genuine, it was so adjudged, and the Commonwealth appealed to the Court of Appeals of Virginia. Observe, therefore, that the attempt to introduce an issue foreign to the proceeding under consideration having been refused by the trial court,

there was neither opportunity nor occasion for the plaintiff to "claim" or "specially set up" his constitutional right to protection. In like manner he could not so claim or specially set up in the appellate court, because cases there are heard only upon the record as made up in the court below, which cannot be added to or diminished in any respect after it reaches the Court of Appeals.

Nevertheless, the Court of Appeals, without a word as to the real issue of the case, the genuineness of the coupon, disposes of the rights of the plaintiff, for which he has had no opportunity to claim Federal protection of record by the glaring perversion of the Supreme Court's decision, expecting thus to defeat his appeal here. In *Smith* v. *Greenhow*, 109 U. S. 669, there was no claim of any Federal right, although there was opportunity for specially setting it up, by special demurrer, yet this court *inferred* that it was relied on, and took jurisdiction. The rule in *Murray* v. *Charleston*, 96 U. S. 432, applies with fourfold force: "If the facts and the decisions are such as to show that a Federal right was adversely decided below, the jurisdiction of the Supreme Court is not defeated by showing that the record does not mention a Federal question, or state in terms that one was presented below."

Respectfully submitted,

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For Plaintiff in Error.

RICHMOND, *October*, 1, 1897.